TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 159.

THE STATE OF MINNESOTA, APPELLANT,

vs.

C. N. BRUNDAGE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED NOVEMBER 26, 1900.

(17,571.)

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Exhibit A

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Writ of *habeas*
Order postpon
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(17,571.)

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1 UNITED STATES OF AMERICA:

In the Matter of the Petition of C. N. BRUNDAGE for a Writ of *Habeas Corpus.*

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota for the September, A. D. 1899, term of said court, held in the city of Minneapolis, in said district, in the year of our Lord one thousand eight hundred and ninety-nine.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this twenty-first day of August, A. D. 1899, came the petitioner above named, by Mr. C. A. Severance, his attorney, and filed in this court his petition herein in words and figures as follows, to wit:

2 UNITED STATES OF AMERICA, }
District of Minnesota. }

In the United States Circuit Court, Eighth Judicial Circuit.

To the honorable the judges of said court:

Your petitioner, C. N. Brundage, represents that he is unlawfully restrained of his liberty by Harry M. Burke, lieutenant of police of the city of Minneapolis, with directions to deliver your petitioner to the keeper of the workhouse, which is the common jail of the city of Minneapolis, in the county of Hennepin and State of Minnesota, at the said city of Minneapolis, in said State. The pretended cause of restraint is as follows:

On the 22nd day of May, 1899, at the city of Minneapolis, in said county of Hennepin and State of Minnesota, one W. C. Corbett filed with the municipal court of said city of Minneapolis, which is the court having jurisdiction of offenses committed in said city, an affidavit and complaint in the words following, to wit:

"STATE OF MINNESOTA, }
County of Hennepin, } *ss:*

Municipal Court, City of Minneapolis.

William C. Corbett, being duly sworn, makes complaint to the above-named court and says that on the 22 day of May, A. D. 1899, at the city of Minneapolis, in said county of Hennepin, State of Minnesota, C. N. Brundage, then and there being, did wilfully, unlawfully, and wrongfully offer and expose for sale and have in his possession with intent to sell a quantity of a certain compound designed to take the place of butter, and made in part from animal and vegetable oils and fats not produced from milk or cream, said compound being an article commonly known as oleomargarine, and being then and there colored with a coloring matter whereby

the said article and compound was made to resemble butter, contrary to the statutes in such case made and provided and against the peace and dignity of the State of Minnesota.

Wherefore complainant prays that said offender may be arrested and dealt with according to law.

WILLIAM C. CORBETT.

Sworn to and subscribed and complained of before me this 24th day of May, A. D. 1899.

HENRY N. LOHREN,
Deputy Clerk of the Municipal Court."

3 And thereupon a warrant was issued out of the said municipal court for the arrest of your petitioner, and the same was duly delivered to an officer of said city, county, and State to be executed; that pursuant to the command of said warrant said officer arrested your petitioner and brought him before said municipal court for trial upon the charge set out in said affidavit and complaint; that thereupon the said cause was from time to time adjourned, and the said trial was finally commenced on the 7th day of July, 1899, and completed on the 10th day of July, 1899, when said cause was taken under advisement by the said court.

That attached hereto, marked Exhibit "A," is a true and correct copy of all the proceedings had and testimony offered upon said trial, the contents of which said Exhibit "A" your petitioner begs leave to make part of this his said petition as fully as though herein set forth at length.

That the judge of said municipal court, having duly considered the said matter, did on the 31st day of July, 1899, adjudge your petitioner guilty of the alleged offense charged in said complaint, and that he pay a fine of twenty-five dollars, or in default thereof that he be committed for a period of thirty days and confined in said workhouse, which is the common jail of said city of Minneapolis, in said county and State, and that a stay of execution was had, which said stay expired this day.

Your petitioner further avers that he did not pay the said fine of twenty-five dollars so imposed upon him by said court, and that thereupon the said municipal court issued a writ of commitment to to said officer, Harry M. Burke, in which he, said Burke, was directed to deliver your petitioner to the keeper of said workhouse, which is such common jail, commanding said last-named officer to take and confine him, your petitioner, for the period of thirty days in said workhouse of said city of Minneapolis.

4 That by virtue of said mittimus the said Harry M. Burke seized the person of your petitioner, holds him in custody, and is about to confine him, your petitioner, in the workhouse aforesaid, in obedience to the command of said writ.

That the affidavit and complaint aforesaid charges your petitioner with the violation of a pretended act of the legislature of the State of Minnesota entitled "An act to prevent fraud in the sale of dairy products, their imitations or substitutes; to prohibit and pre-

vent the manufacture or sale of unhealthy or adulterated dairy products, and to preserve the public health," which said act was approved April 19, 1899.

Your petitioner further shows that at the time and place alleged in said affidavit and complaint and as more fully appears by the uncontradicted testimony fully set forth in said Exhibit "A," your petitioner offered for sale and actually sold a quantity of oleomargarine, to wit, a ten-pound package of the same, then and there intending the same for consumption as human food, in said county of Hennepin and State of Minnesota, which said oleomargarine was the ordinary, common oleomargarine of commerce and was manufactured in the State of Indiana and therefrom carried as an original package to said county of Hennepin and State of Minnesota, and in all respects was fit for human food.

Your petitioner further shows that said oleomargarine, after being so manufactured in said State of Indiana, was sold in said State to the Hammond Packing Company, a corporation of which your petitioner is the agent and manager at said Minneapolis, which said corporation is organized and existing under the laws of the State of Illinois and is a citizen of said State and engaged in the business of handling meat products and oleomargarine and butterine.

That the said package of oleomargarine was so shipped in an unbroken form — said Hammond Packing Company, in Indiana, to said Minneapolis, Minnesota, and was so sold to the said Corbett, the complainant, and was at all times until said sale to said Corbett, and after the time of its purchase by said Hammond Packing Company, an unbroken, original package, as fully appears by the said testimony contained in said Exhibit "A;" and your petitioner shows that his restraint and imprisonment aforesaid are unauthorized and illegal, because, first, the said act of the legislature of the State of Minnesota is in violation of article I, section 8, of the Constitution of the United States, which provides that "the Congress shall have power to regulate commerce among the several States;" 2nd,

That said act of the legislature of the State of Minnesota is a violation of section II, article 4, of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of the citizens in the several States;" 3rd,

That said act of the legislature of the State of Minnesota is in violation of section I, article 14, of the Constitution of the United States, providing that "no State shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws;" 4th,

The act aforesaid being in conflict with the provisions of the Constitution of the United States is void, and said municipal court was without jurisdiction in the cause aforesaid.

Therefore your petitioner asks that a writ of *habeas corpus* may be granted, and that he may be discharged from such unlawful restraint and imprisonment.

C. N. BRUNDAGE.

6 STATE OF MINNESOTA, } ss:
County of Hennepin, }

C. N. Brundage, being duly sworn, upon oath says that he is the petitioner in the above and foregoing petition, and that the matters and things therein set forth are true in substance and fact.

C. N. BRUNDAGE.

Subscribed and sworn to before me this 21st day of August, A. D. 1899.

P. S. NEILSON,
[NOTARIAL SEAL.] *Notary Public, Hennepin County, Minnesota.*

7 EXHIBIT "A."

STATE OF MINNESOTA, }
County of Hennepin. }

Municipal Court, City of Minneapolis.

STATE OF MINNESOTA }
vs.
C. N. BRUNDAGE, Defendant. }

The above-entitled cause came on for trial and was tried on the 7th and 10th days of July, A. D. 1899, before Hon. Andrew Holt, judge of said court, without a jury, Messrs. H. D. Dickinson and Charles W. Somerby appearing for the State and Messrs. Davis, Kellogg & Severance appearing for the defendant, when the following proceedings were had:

WILLIAM C. CORBETT, after being first duly sworn, testified:

By Mr. DICKINSON:

Q. Mr. Corbett, do you know Mr. Brundage, the defendant?
A. Yes, sir; I do know him.
Q. What is your business, Mr. Corbett?
A. I am connected with the State dairy and food department as an inspector.
Q. In this State?
A. In this State; yes, sir.
Q. On the 22d day of May last, here in the city of Minneapolis, Hennepin county, Minnesota, did you purchase from Mr. Brundage an article known as oleomargarine?

Mr. SEVERANCE: I object to that as incompetent, irrelevant, and immaterial, for the reason that the pretended law under which this complaint was made is unconstitutional and void, being a contravention of the Constitution of the United States.

The COURT: Do you wish to argue the matter?

Mr. SEVERANCE: Not now; no.

8 The COURT: Objection overruled.

Mr. SEVERANCE: Exception.

A. Yes, sir; I did.

Q. At what place in the city was the purchase made?

Mr. SEVERANCE: May it be understood that all this testimony be received subject to my objection and exception?

The COURT: Yes.

A. Near Seventh street and Third avenue north.

Q. In what kind of a place?

A. In a place of business there where meats and lard and oleomargarine was sold.

Q. State the transaction that took place at that time between you and Mr. Brundage, the defendant.

A. At that date, accompanied with Mr. McConnell, we went up to the place of business known as the Hammond Packing Company's, and I inquired if they had some oleomargarine in stock. They told me they had. I asked for the manager of the place, and Mr. Brundage came out and told me he was the manager. I told him we wanted to purchase some oleomargarine. He instructed one of the men in the house to bring some out of the back part of the store, and he brought a package forward and opened it up, which contained ten pounds of presumably oleomargarine, put up in one-pound prints, stamped with a design of a wheat sheaf, gold and yellow in color, resembling creamery butter. I asked him the price. He told me fourteen cents a pound. I told him I would take a bill for it and paid him, and he took a registry where I lived, which I gave him, and at that time, not knowing his name, asked him his name, so that I might have the data to use afterwards.

Q. Was it a package which was opened that you purchased?

A. The package was opened by the man who brought it from the room. Whether it was opened before or not I don't know. It was a ten-pound wooden box——

Q. When you saw it was it opened?

A. When I saw it first I think the man had it in his hand, 9 and he brought it out and opened it with an opener.

Mr. SEVERANCE: It wasn't open when you first saw it?

A. No; but whether it had been opened before or not I don't know.

Q. What I want to know is, was the package broken in your presence?

A. Yes, sir; it was opened in my presence.

Q. In what way was it sealed or closed?

A. With nails only, so far as I noticed or observed.

Q. A box?

A. A wooden box.

Q. Were the nails drawn from it?

A. He used, I think, what we call a box-opener to just pry the cover off from the box.

Q. So that the cover of the box was entirely taken off?

A. Yes, intact.

Q. Was any of it taken out at that time?

A. I took it out and examined it to see the characteristics of it.

It was wrapped or put up in a tissue paper, each print; I unrolled that so as to see the character and color of the oleomargarine.

Q. Did you handle more than one of the prints?

A. I think two. I think I took out one and opened it, and then another; handed it to Mr. McConnell, who was with me. That I won't be clear about, but that is my impression.

Q. Then you replaced it?

A. Put it back into the box and closed the box up.

Q. You took the box away with you?

A. Yes, down to Sixth street, and stepped into Mr. Longfellow Brothers' store.

Q. Who was with you at the time you took it away?

A. Mr. McConnell.

Q. How much did you pay for it?

A. Fourteen cents a pound; $1.40 for the package.

Q. What was the color of the article purchased by you as compared with natural color?

A. It was a golden yellow; resembled and bore every appearance of a package of creamery butter or fine dairy butter.

Mr. SEVERANCE: I move to strike out the latter part of that answer as not responsive.

The COURT: Motion denied.

Exception taken by defendant.

Q. Did Mr. McConnell go with you to the place where you took this package?

A. Yes, sir.

Q. What was done with it then?

A. I took it from there and took it down to Mr. Longfellow's store and opened it in his store and showed Mr. Longfellow——

Mr. SEVERANCE: I object to that.

The COURT: Just state what you did with it.

A. Well, I took it there and from there I took it to the office at 424 Guaranty Loan building, where it was given into the custody of Mr. McConnell, who took it from there to St. Paul.

Q. Did you see it afterwards?

A. Yes, sir; I saw the package in St. Paul just as I have seen it here.

Q. You saw it afterwards at the State chemist's?

A. Yes, sir.

Q. What did you see down there, anything after that?

A. There was nothing done with the package after that.

Q. Did you see it examined at all?

A. I didn't see it examined at the State chemist's. I saw the package there and took one of the bricks out and brought it up here again for the purpose of having it examined by one of the chemists here.

Q. Who did you bring it to here?

A. Doctor Drew.

Q. And when did you leave that with him?
A. I think it was on Wednesday that I left it with Doctor Drew.
Q. Were these pound prints marked in any way?
A. No, sir——

Mr. SEVERANCE: That is objected to as incompetent, irrelevant, and immaterial.
The COURT: Objection overruled.
Exception taken by defendant.

Q. The prints—was there anything on the prints to indicate what they were?
11 A. The prints were not marked with letters in anything.
Q. Either the tissue in which they were wrapped or upon the oleomargarine itself?
A. Neither one.
Q. Not marked in any way?
A. They were marked with a stamp of a wheat sheaf on each print.
Q. That is, a form of a wheat sheaf?
A. Yes, sir; was on each print.
Q. Was there any other description you wish to give as to the condition of the oleomargarine?
A. Nothing, except the answer I would make to that, that it resembled butter in appearance and in color.

Cross-examination.

By Mr. SEVERANCE:

Q. Mr. Corbett, butter is of a good many different shades, is it not?
A. Why, it possibly admits of an answer, yes, sir.
Q. You would have to say "Yes," in order to tell the truth, wouldn't you? There are a good many different shades of butter, is there not?
A. There is no blue butter that I ever saw——
Q. Just answer the question. I say there are many different shades of butter, are there not? I don't say butter is made of every shade in the world, but there are many different shades of butter. Isn't that true?
A. Well, I would like to——
Q. Answer the question.
A. If two is many, I would say yes, sir.
Q. Then, do you mean to say, Mr. Corbett, that there are only two shades of butter?
A. I didn't say that; there are several distinct colors. Now, many colors would mean a majority in that sense of the word; there are a good many shades of yellow——
Q. I didn't say different colors. I said shades.
A. Shades of colors?
Q. There is butter that is almost white?
A. Yes, sir.

12 Q. And butter with a little tinge of yellow?
A. Yes, sir.
Q. And other butter with a greater tinge of yellow?
A. Yes, sir.
Q. And so on until you get to butter that is very yellow?
A. Yes, sir; I can answer that intelligently, but there are not many shades.
Q. Now, Mr. Corbett, this oleomargarine that you saw was about the color of what you call yellow creamery butter, wasn't it?
A. Yes, sir.
Q. It wasn't the color of white or light colored butter, was it?
A. No, sir.
Q. It was the color of one shade of butter only; I mean it was the same shade of one shade of butter?
A. Why, it would only have one shade of color.
Q. And it differed in color or shade from all other shades of butter, didn't it?
A. Possibly true.
Q. Now, when you went there to the establishment of the Hammond Packing Company you didn't ask for butter, did you?
A. No, sir.
Q. You asked for oleomargarine?
A. Yes, sir.
Q. And this package which, so far as you know, had never been broken up to that time was brought out by one of the men and there opened by him?
A. Yes, sir.
Q. That package had on it the Government stamp, did it not?
A. The internal-revenue stamp; yes, sir.
Q. That is what I mean.
A. Yes, sir.
Q. And when you bought this oleomargarine you say that Mr. Brundage, who represented himself to you as the manager, took your name and address?
A. Yes, sir.
Q. Made out a little slip, didn't he, showing the sale?
A. I presume so.
Q. Have you that box with you?
A. Yes, sir; the box is here.
Q. Bring it in and let's look at it.
A. That is it.
13 Q. Exhibit A is shown witness. Is Exhibit A the box in which this oleomargarine was contained and which you so purchased?
A. Yes, sir.
Q. At the time you purchased it were these words, "The G. H. Hammond Company's Calumet oleomargarine factory No. 16, sixth district of Indiana," stamped on the box?
A. It was.
Q. And the letters 13–3–10 stamped on the box?
A. Yes, sir.

Q. At that time was the United States internal-revenue oleomargarine stamp, being a stamp for a ten-pound package, on the box?
A. I presume so, but I didn't look to see what it was marked, but I have no doubt but what it was there.
Q. Was the stamp, "Form 219. Factory No. 16, 6th district, State of Indiana. Notice.—The manufacturer of the oleomargarine herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package again or the stamp thereon again, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases"—was that on the box at the time?

Mr. SOMERBY: Objected to as incompetent, irrelevant, and immaterial.
The COURT: Objection overruled.
Exception taken by the State.

A. I presume it was. I didn't notice that because I had no particular reason for noticing it.
Q. Was the stamp destroyed?
A. I don't know.
Q. You didn't put the stamp on, did you?
A. No, sir.
Q. The box was nailed up as it is now nailed here in court or practically so?
A. It was nailed when he brought it into the room.
Q. You took it away, and it was nailed up?
A. He did or I did; I don't know which.
Q. Before you took it away?
A. Yes, sir.
Q. It was nailed up practically as it is now—the top was nailed?
A. Nailed onto the box again; yes.

14 Mr. SEVERANCE: I will offer in evidence this box—Exhibit A—simply the box.
The COURT: Received.

W. W. P. MCCONNELL, after being first duly sworn, testified:

By Mr. DICKINSON:

Q. Mr. McConnell, were you with Mr. Corbett at the time he purchased Exhibit A, with its contents?
A. Yes, sir.
Q. Of Mr. Brundage, at the place testified to by Mr. Corbett?
A. Yes, sir.
Q. Here in this city, Hennepin county, Minnesota?
A. Yes.
Q. You may state the circumstances of the purchase.
A. I accompanied Mr. Corbett up to the Hammond Packing Company's; we went in and inquired for the goods, and they brought the goods forth and stated the price——
Q. Well, state what was said.

A. We went in and inquired for oleomargarine; told him we wanted to buy some. Mr. Brundage sent one of the men after some and it was brought in; the cover was removed. We looked at it somewhat, and he paid him for the goods.

Q. Paid him the amount mentioned by him in his testimony, I presume?

A. Yes, sir.

Q. You examined the package after it was opened?

A. Yes, sir; I did.

Q. Describe the appearance of the butter so far as the color is concerned—oleomargarine, I mean.

A. I didn't get the question.

(Question read.)

A. Why, the color, I should say, was the color of Gilt Edge—of what is known as creamery extra.

Q. Well, what color is that?

A. Well, it is a yellow color.

Q. Well, is this one of the prints?

A. You just took it from the box, I should say yes.

Q. Is that the color it was at the time it was purchased?

A. Yes, sir; I think so.

Mr. DICKINSON: We offer this in evidence and will have it marked Exhibit B.

The COURT: Very well. Received.

Q. Mr. McConnell, what was done with the package at the time—did you go with Mr. Corbett?

A. I did; yes, sir.

Q. Did you see it at the State chemist's, St. Paul?

A. Oh, I carried the butter—we carried it to the office 424 Guaranty Loan, then I took charge of it and carried it to St. Paul and delivered it to the department chemist.

Mr. SEVERANCE: You both use the word "butter;" I suppose you mean oleomargarine?

Mr. DICKINSON: Yes; I want to get that right.

Mr. SEVERANCE: No cross-examination.

LEVI LONGFELLOW, after being first duly sworn, testified:

By Mr. DICKINSON:

Q. Mr. Longfellow, where is your place of business?

A. 208 North Sixth.

Q. Showing you Exhibit A, did you see that box with its contents of oleomargarine at the time mentioned by Mr. Corbett, when he brought it to your place?

A. Yes, sir.

Q. Did you examine it there?

A. Yes, sir.

Q. What is your business, Mr. Longfellow?

A. Wholesale produce, fruits.

Q. Handling butter?
A. Yes, sir.
Q. How long have you been handling that article?
A. Over thirty years.
Q. I will ask you if this oleomargarine at the time it was brought to your place by Mr. Corbett to be examined by you re-
16 sembled butter?
A. It speaks for itself—it certainly did.
Q. We want to get your answer to that.
A. It did; yes, sir.
Q. In what way?
A. In shape and color.
Q. Describe its color.
A. What I would call a golden straw color.
Q. And its color, as compared with creamery butter?
A. It would be difficult to distinguish in appearance. I might add also in flavor—that is, the odor—the shape, color, and odor.

Mr. SEVERANCE: I move to strike out that part of the answer in regard to shape and odor.
The COURT: I will let him describe the appearance of the butter. Motion denied.
Exception taken by defendant.
WITNESS: I intended that last additional answer to go with the first answer, to describe the article—shape, color, and odor or flavor.

Q. In all those respects it resembles what?
A. Creamery butter.

Cross-examination.

By Mr. SEVERANCE:

Q. Mr. Longfellow, you have been handling butter for thirty years, you say?
A. Yes, sir.
Q. You have handled a great deal of butter, and there is a good deal of butter put upon the market that is very different in color from this?
A. Oh, yes.
Q. Then what you mean, so far as oleomargarine, the color is concerned, is it resembles one kind of butter—creamery butter?
A. Yes, sir.
Q. Creamery butter is made with the use of coloring or extract, is it not?
A. I don't know; I never made any.

Mr. SOMERBY: That is objected to as immaterial and incompetent.
Mr. SEVERANCE: He says he don't know.

17 Q. Your only knowledge, then, of creamery butter is, then, after it is put upon the market?
A. Yes.
Q. You never made any?

A. No, sir; not at all.
Q. Never made any at all?
A. No, sir.
Q. You mean, then, that this oleomargarine resembles what has been handled by you as creamery butter?
A. Yes, sir.
Q. You have seen oleomargarine before, haven't you?
A. I do not know that I have seen it in a good many years; I think I saw oleo when it was first put upon the market.
Q. Not since?
A. No, sir.
Q. You don't know of your own knowledge whether this is the ordinary color of oleomargarine?
A. No; so far as the appearance is concerned, I should as soon take it for butter as anything else.
Q. You don't know of your own knowledge whether that is the ordinary color of oleomargarine?
A. No, sir.
Q. In fact, you don't handle oleomargarine and don't know anything about it?
A. No.

J. A. HUMMEL, after being first duly sworn, testified.

By Mr. DICKINSON:

Q. Mr. Hummel, you are State chemist?
A. I am assistant.
Q. Connected with the state department at St. Paul?
A. Yes.
Q. Have you examined in your capacity, official capacity, the oleomargarine in this case?
A. I did.
Q. Have you an analysis with you?
A. I have.
Q. Will you give us the result of your examination?

Mr. SEVERANCE: I object to that as incompetent, irrelevant, and immaterial.
The COURT: Objection overruled.
Exception taken by defendant.

18 A. The chemical examination of this material showed it to be oleomargarine; and the further tests that we made were to show the coloring matter, and it was found that it was colored with what is known as "butter yellow," which is a coal-tar product. That is as far as the chemical examination went.
Q. What is the effect of this coloring mixed with the compound or mixed with what is called oleomargarine?

Mr. SEVERANCE: That is objected to as incompetent, irrelevant, and immaterial.

Q. Well, what is butter yellow?

A. It is a coal-tar color or handled in dye.

Q. Do you know the natural color of oleomargarine without this yellow butter in it?

A. I have never seen any.

Q. How much of that did you find in this?

A. I didn't make a quantitative determination; simply the quality.

Q. I will ask you, if you know, what the effect of the use of butter yellow is upon being mixed with oleomargarine in its pure stage.

Mr. SEVERANCE: I object to that as incompetent, irrelevant, and immaterial.

The COURT: Objection sustained.

Mr. DICKINSON: Whether it would tend to make it a red or blue or other color?

The COURT: I thought the witness said he didn't know the color of oleomargarine in its natural state.

Q. State what is the effect on the oleomargarine with the use of butter yellow.

A. I stated it was pretty near that color.

Q. What color is it?

A. It comes with butter yellow—the same color.

Q. Does it make it a color resembling this ordinary butter?

A. Yes, sir.

19 Cross-examination.

By Mr. SEVERANCE:

Q. Mr. Hummel, you don't know the color of oleomargarine?

A. I have never seen any.

Q. You don't know whether oleomargarine is yellow, do you?

A. No, sir.

Q. You don't know?

A. No, sir.

Q. And this last question you answered about ordinary color, all you meant to say was it makes it the color of these bricks here in evidence?

A. Yes; before the oleomargarine is yellow it increases the color.

Q. So that it deepens—simply deepens the shade; that is your idea, is it?

A. Yes, sir.

Q. And the extent as to its being deepened depends upon that butter yellow that is used?

A. Yes, sir.

Q. What is the name of the manufacturers who make this butter yellow?

A. I couldn't say.

Q. Is it Wells and Richardson?

A. I don't know; possibly they make it.

Q. You know of that firm?

A. Yes; they sell a butter color. I have never examined it.
Q. You wouldn't undertake to say that isn't it?
A. No, sir.

Redirect examination.

By Mr. DICKINSON:

Q. As to color, what would be the effect of the use of this butter yellow on the oleomargarine that was more white than yellow?
A. It would give it a yellow shade.

By Mr. SOMERBY:

Q. What is the color of this coloring matter which went into this oleomargarine?
A. It is bright gold and yellow.
Q. Do you know what that is made of—what it consists of in its natural state?

20 Mr. SEVERANCE: That is objected to as incompetent, irrelevant, and immaterial.
The COURT: Objection sustained.

Q. Is this butter yellow that you speak of known by any other name, as menthol orange? What is the chemical name of it?

Mr. SEVERANCE: Objected to as immaterial, incompetent, and irrelevant.

A. It is dimethyl-amido-azo-benzene.
Q. What did your analysis show as to these constituents which you examined? What does oleomargarine consist of?

Mr. SEVERANCE: That is objected to as incompetent, irrelevant, and immaterial.

Q. I will ask you if you can give the constituents of oleomargarine, combined as they are necessarily to make oleomargarine. Would you be able to tell from these constituents what the color of the product would be?
A. Will you state that again?
Q. Well, do you know the constituents of oleomargarine?
A. Yes, sir.
Q. What are they?

Mr. SEVERANCE: Objected to as incompetent, irrelevant, and immaterial.

A. Oleomargarine is made of oleo oil, which is a soft oil from tallow and cotton-seed oil. Those are the principal constituents.
Q. Do you know the color of those constituents in their natural state? What is the color of the tallow that you speak of?
A. No, sir; I don't know.
Q. Do you know the color of tallow?
A. White with yellowish tinge.
Q. What is the color of cotton-seed oil?
A. In its pure state it is a yellowish tinge.

21 Recross-examination.

By Mr. SEVERANCE:

Q. Is there any other yellow substance in making oleomargarine except these two?
A. In this case there is.
Q. Don't they use yellow in cream, too, and milk?
A. Yes, sir; I suppose they do.
Q. But little yellow in cream and milk, isn't it?
A. I don't think so.
Q. There is a little butter in this, too, isn't there?
A. No, sir; not in this.
Q. Butter isn't a constituent part in the oleomargarine?
A. It is in some cases.
Q. There is cream in this, isn't there?
A. No, sir.
Q. How do you know?
A. By the analysis.
Q. Is there milk in it?
A. Yes, sir.
Q. Is there any milk in it?
A. Some milk; there isn't cream.

W. W. P. MCCONNELL recalled.

By Mr. SOMERBY:

Q. Have you had some experience in the manufacture of butter?
A. Some; yes, sir.
Q. How much?
A. I have been manufacturing for five or six years steadily.
Q. Do you know the color of butter in its natural state?
A. Why, yes, sir; in a general way.
Q. What is the color?
A. It is a yellow.
Q. A yellow?
A. Yes, sir.
Q. Is it a deep yellow or a light yellow?
A. I don't know what you would call a deep yellow or a light yellow.
Q. You are a butter man; you ought to know something about it.
A. Well, I should call it a bright straw color.
22 Q. As compared with this oleomargarine that we have here, is that a light-colored butter or a bright-colored butter?
A. I think that is as near as you can get of standard butter.
Q. Is that the deepest or the lightest or the medium color that comes in, for instance?
A. Standard would be as near a perfect butter as you could get at it.
Q. I am asking you whether that is a medium color.
A. That is what I am telling you.
Q. Butter in its natural state, what color is it?

A. I should say that is about right.
Q. What do you mean by that?
A. The natural color of butter. If it would be in order I would say that I brought a sample of my own manufactured butter without any coloring in and compared that with it.

Mr. SEVERANCE: I move to strike that out.
The COURT: It may be stricken out.

Q. Showing you this bottle, I will ask you as to the color; how the natural color of butter compares with that color.
A. It is much darker, deeper.
Q. Then, if that was pure oleomargarine, butter color would be a deeper yellow color?
A. Yes, sir.

Mr. SOMERBY: State offers in evidence a bottle of supposedly oleomargarine, representing the color of pure oleomargarine—Exhibit C.
Mr. SEVERANCE: I object to that as no foundation laid.
The COURT: Objection sustained.

Q. Well, then, what color would you call that in this bottle here?

Mr. SEVERANCE: That is objected to.
The COURT: Objection sustained.

Q. Well, you know the color white when you see it, don't you?
A. Ordinarily; yes, sir.
Q. Now, then, you know yellow when you see it, don't you?
23 A. Yes, sir.
Q. You know orange when you see it, don't you, the color of orange?
A. Yes, sir.
Q. Do you know the shades between orange and white?
A. I wouldn't want to say that I did; not all of them; no, sir.
Q. But you can tell when a color comes up from white to a deep orange?
A. I can tell a deep orange.
Q. The shades between those two points you would be able to distinguish, wouldn't you?
A. Well, I don't know.

Cross-examination.

By Mr. SEVERANCE:

Q. What season of the year do you make butter?
A. All the year round.
Q. Do you mean to say that butter in the winter, its natural state, is as dark as this oleomargarine in evidence?
A. Yes, sir.
Q. Have you ever seen any white butter in the winter?
A. Yes, sir.
Q. That isn't colored white, is it?

A. I should suppose not.

Q. That is its natural color—that is the natural color of this white butter, isn't it?

A. Speaking of white butter——

Q. You answer my question. You have seen a great deal of butter, natural butter, in the winter which is of a very much lighter color than that?

A. Yes, sir.

Q. You have made butter very much lighter than that?

A. I have not; no, sir.

Q. You have Jersey cows, have you?

A. Yes, sir.

Q. Butter made from ordinary cows in the winter isn't as light as that, is it?

A. I think butter that is not affected from feeding, the natural butter, would show the color of that.

Q. By "that" you mean this block of oleomargarine introduced in evidence, don't you?

A. Yes, sir.

24 Q. You have been about the dairy stores more or less, haven't you?

A. Yes, sir; somewhat.

Q. You have seen butters of very different shades in those store-, haven't you?

A. Yes, sir.

Q. You have seen butter almost as white as lard, on sale, haven't you?

A. Why, I——

Q. Have you seen it or not?

A. I don't know, sir, but what I have.

Q. You know you have seen butter almost as white as lard, on sale, haven't you, in the stores?

A. I believe I did answer the question, did I not?

Q. You didn't quite answer it.

A. I wanted to, and you objected——

Q. Just answer; have you or have you not?

A. I have seen lighter butter, and would like to explain in answer to that——

Q. You have seen it on sale in the stores?

A. I would like to be understood——

Q. You have seen butter on sale in the stores almost as light color as lard, have you not?

A. No.

Q. Have you ever seen butter as light-colored as the substance in this bottle?

A. I don't think I ever saw any that color.

Q. Have you ever seen any butter as light substance as this in this bottle?

A. Yes, sir.

Q. As near white as this?

A. Yes, sir.

Q. And have seen it on sale, haven't you—exposed for sale—in the store?

A. I think I have.

Q. This creamery butter you speak of is made the color of butter that is sold by the use of coloring matter, isn't it?

A. I don't know.

Q. Don't you know it is a fact that creamery men do color their butter?

A. I think the most of them do——

Mr. SOMERBY: I object to that as incompetent, irrelevant, and immaterial, and move that it be stricken out.

The COURT: Motion denied.

25 Q. The butter that you speak of as the yellow creamery butter, what you call perfect butter or standard butter, that is made by the use of coloring matter, isn't it?

A. Not always.

Q. Isn't it usually?

A. I don't know.

Q. It is sometimes?

A. I think so.

Q. So when you say this substance in evidence here resembles creamery butter, you mean it is made of butter and in that butter there are coloring matters of some kind?

A. I don't know.

Q. Doesn't this oleomargarine resemble butter made at creameries where they have used coloring matter in its manufacture?

A. I presume it does.

Redirect examination.

By Mr. SOMERBY:

Q. It also resembles butter in which no coloring matter is used, butter in its natural state?

A. Yes, sir; that is the explanation I wanted to make to explain the position exactly.

By Mr. DICKINSON:

Q. Coloring matter is used in the lighter-colored butters for the purpose of making them more yellow, isn't it?

Mr. SEVERANCE: That is objected to as immaterial.

The COURT: That is a matter of common knowledge.

Q. The purpose of making the lighter-colored butter more yellow is for the purpose of making ordinary butter good butter.

Mr. SEVERANCE: Objected to as incompetent, irrelevant, and immaterial.

The COURT: Objection sustained.

Q. How long have you been an inspector of butter?

A. I was State inspector of creameries and inspected butter for about two years.

26 Q. Up to the present time?
A. Yes, sir.
Q. Continually handling butter?
A. Yes, sir.
Q. Acquainted with its manufacture in dairies and creameries?
A. Yes, sir.
Q. What is the natural color of pure creamery butter? That seems to have been brought into question here on cross-examination by counsel for the defendant.

Mr. SEVERANCE: That is objected to as incompetent, irrelevant, and immaterial.
The COURT: Ask him how much he knows about the coloring matter that is used in these creameries.

Q. I will ask you this question: From your experience in the butter market and from your examination of dairies and creameries where butter is produced, is the lighter color to which you have testified on cross-examination the usual or unusual color of butter?

Mr. SEVERANCE: I object to that as incompetent, irrelevant, and immaterial.
The COURT: Objection overruled.
Exception taken by defendant.

A. Do you refer to butter that is colored or natural?
Q. Butter as you find it in creameries, dairies, and on the market—natural butter.
A. The butter that I find in the creameries?

Mr. DICKINSON: You don't understand the question.

(Former question read.)

—. I guess I am thick-headed. I did not get the point there now.

(Question again read.)
Mr. SEVERANCE: Same objection.
The COURT: Objection overruled.
Exception taken by defendant.

A. Usual.

27 Recross-examination.

By Mr. SEVERANCE:

Q. Now, Mr. McConnell, in the month of June butter is yellowish, isn't it?
A. Yes, sir; I think so.
Q. Take butter from a Jersey cow made in the month of June, where the cow is out in grass and nicely fed, the butter from it is a more pronounced yellow that this brick, isn't it?
A. Our butter is about half Jersey and about half from common cattle——

Mr. DICKINSON: Didn't you understand that question?

A. Yes, sir. I am trying to answer it intelligently.

(Question read.)

A. Well, I can speak from experience, and just what I was trying to explain—it is just as near that as I can possibly get it.

Q. Isn't it a matter of fact that from what you were about to explain is from your own experience?

A. Yes, sir.

Q. Now, as an expert, I ask you if butter made in the month of June from Jerseys—not others, but Jersey cows—where the cows are nicely pastured and fed, isn't it a deeper and more pronounced yellow than this brick in evidence?

A. I think it might be; I don't know.

Mr. SOMERBY: You don't know?

A. No, sir.

Mr. SEVERANCE: Just wait a minute, please. I am not through yet.

Q. Now, you have been around inspecting creameries, have you?

A. Yes, sir.

Q. Two years?

A. Yes.

Q. And you have seen a good deal of creamery butter, haven't you?

A. Yes, sir.

Q. That creamery butter is the same all the year round, isn't it, when it is turned out of the factory?

A. Yes, sir.

Q. And that butter is obtained by putting in coloring matter, isn't it?

A I don't know in all instances, but I know it is very often.

28 Q. The dairy—the small farmers who make butter for the market don't use these coloring extracts, do they, usually?

A. Some do and some don't.

Q. The most of them don't, do they?

A. I couldn't state as to that.

Q. You say some do and some don't?

A. Yes, sir.

Q. Those who don't, I suppose their butter varies from time to time?

A. We don't inspect private creameries, as a rule. I have seen butter more or less in the market. My own butter is from a private dairy and not a public creamery.

Q. Do you use coloring in your butter matter?

A. No, sir; I never do.

Q. It varies—the coloring varies differently at different seasons of the year?

A. I should say in June it is a brighter color; it is a good color.

Q. You usually make good butter, I presume?

A. Yes; I presume so.

BENJAMIN D. WHITE, after being first duly sworn, testified:

By Mr. SOMERBY:

Q. What is your business, Mr. White?
A. Assistant State dairy and food commissioner.
Q. How long have you been holding that position?
A. Since the first of January.
Q. Have you been a manufacturer of butter?
A. I have.
Q. How long?
A. About seventeen years.
Q. Manufactured it yourself?
A. Yes, sir.
Q. Where?
A. Both in this State and Iowa.
Q. From pure milk and cream?
A. Yes, sir.
Q. During that time you have dealt in considerable quantities of butter, have you?
A. Yes, sir.
29 Q. How much?
A. Sometimes, on an average, a thousand pounds a day.
Q. Working for yourself or some one else?
A. No, sir; some one else.
Q. Engaged in the actual manufacture of butter yourself?
A. Yes.
Q. Do you know the natural color of butter?
A. I think I do.
Q. What is it?
A. It is a light straw color.
Q. As compared with this sample of oleomargarine—how does it compare with this sample?
A. That is about a light straw color.
Q. You call that a light straw color?
A. Yes, sir.
Q. At different seasons of the year does the natural color of butter vary?
A. In localities.
Q. What do you mean by that?
A. Under certain conditions.
Q. Well, state the conditions and the localities.
A. The farther north I think the butter gets whiter in the winter time.
Q. That is your experience?
A. Yes, sir; and farther south it is nearer a uniform color.
Q. What does that uniform color approach?
A. Nearer a light straw color.
Q. You have made butter in this State of Minnesota?
A. Yes, sir.
Q. As well as in other States?
A. Yes, sir.

Q. And the natural color of butter you say resembles this package of oleomargarine?

Mr. SEVERANCE: Objected to as leading and a repetition.

The COURT: Objection sustained.

Q. Butter under certain conditions and at certain seasons of the year is a still lighter color than this sample?

A. I should say an abnormal butter would be.

Q. What do you mean by that?

Q. Butter that is spoiled or partly spoiled in the manufacture.

30 Q. Well, the natural normal color of butter would be this light straw color?

A. Yes, sir.

Q. And the abnormal butter would be what?

A. The light color—white color, and all other colors.

Q. What are the causes that produce that abnormal color?

A. It may be by improper manufacture or by improper feeding, or no feed at all. Where the dairy is carried on extensively, very little color or no color is necessary.

Q. Does the color in Minnesota differ from other States, in your experience?

A. Yes, sir.

Q. In what does it differ?

A. Some of it is whiter.

Q. How about June butter?

A. June butter would be a yellow butter.

Q. In its natural state?

A. Yes.

Cross-examination.

By Mr. SEVERANCE:

Q. You say that June butter is yellow. By that you mean it is darker in color than this straw color you spoke of?

A. Yes, sir.

Q. How is May butter? Is that as dark as June butter?

A. Not quite.

Q. But that is a more pronounced yellow than straw color, isn't it?

A. I think not.

Q. June butter is?

A. Yes.

Q. How about July?

A. About the same as June.

Q. How is August butter?

A. About the same.

Q. Same as June and July. How is September butter?

A. It varies under certain conditions.

Q. How is it, as a rule—about same as June?

A. Just about.

Q. How is October? Does it get to straw color again by that time?

A. Yes, sir.

31 Q. So there are about four months in the year where the butter is more yellow than what you denominate straw color?

A. Yes, sir.

Q. So that now, then, in the winter, say in December, January, and February, take those months together now as stock are ordinarily fed in this country—not fancy dairy—stock that is ordinarily fed, the natural butter made from milk and cattle so taken care of is considerably lighter than this sample of oleomargarine?

A. Not the butter I made last year.

Q. Answer the question.

A. I can only speak from my experience.

Q. Do you mean to say that winter butter with stock ordinarily cared for is the color of this oleomargarine in evidence here?

A. Ordinarily; yes, sir

Q. Where have you manufactured butter?

A. In the southern part of the State.

Q. What county?

A. Freeborn.

Q. How many years?

A. Six years.

Q. And during the last six years in Freeborn county, Minnesota, winter butter the product of ordinary cows ordinarily cared for is as much straw color, as you call it, as this sample of oleomargarine in evidence here?

A. I didn't say so.

Q. What did you say?

A. Not during the last six years.

Q. Does it vary in different years?

A. If I am permitted to explain.

Q. Does it vary in different years?

A. Yes, sir.

Q. Some years it is very much lighter than others?

A. Not exactly that.

Q. Is it lighter some years than others?

A. It is darker some years than others.

Q. How is it ordinarily, is it considerably lighter than this sample of oleomargarine that is in evidence?

A. Can I explain?

Q. Is it not ordinarily, ordinarily one year with another during those three months, a lighter color than this oleomargarine

32 in evidence?

A. Not with my experience.

Q. Is it some seasons?

A. It has been.

Q. During what year?

A. The first year or two I come to Minnesota it was lighter than it is now in the winter time.

Q. Do you mean to say that in the State of Minnesota at the present time natural butter, without any coloring, made from cows ordinarily cared for, is as yellow as this oleomargarine in evidence?

A. Yes, sir.

Q. In the winter?

A. You didn't say winter before.

Q. I said during those winter months.

A. Repeat that again, please.

Q. Do you mean to testify that the butter, manufactured without coloring from milk, made in January, December, and February, along there in the winter months, in the State of Minnesota, from cows cared for in the ordinary way—ordinary cows and not fancy herd—is as yellow as this sample of oleomargarine which is in evidence?

A. In my case——

The COURT: That is not the question. Answer the question.

A. I couldn't say as to ordinarily, because I haven't seen butter throughout the State.

The COURT: Then you aren't competent as an expert here at all.

Q. Where did you work—in a creamery?

A. Yes, sir.

Q. Where was that creamery located?

A. Albert Lea.

Q. Did you ever use coloring matter to make the butter yellow?

A. Sometimes.

Q. What do you do with it if butter is always as yellow as this?

A. I didn't say it is always as yellow.

Q. Have you colored butter during the last three or four years?

A. Not the last year.

Q. Did you prior to the last year?

A. Yes, sir.

Q. What did you do that for?

A. To make it the natural straw color.

33 Q. I thought you said it was the natural color in your experience down there without any coloring matter?

A. I didn't say the last six years; I said the last year.

Q. Then you had an exceptional year, did you, is that it?

A. I don't know it was an exceptional year.

Q. Would one year out of six be your idea of exceptional? Just answer that yes or no.

A. Qualifying that, I think——

Q. Just answer yes or no.

A. I don't know whether it would be or not.

Q. Is there any year except the last year where you didn't use coloring matter?

A. No, sir.

Q. You used coloring matter every year except the last year?

A. Yes, sir.

Q. How much did you color your butter—make it the color of this brick of oleomargarine or more than that?

A. It depended upon the market, some wanted it a light color and some darker.
Q. You would color it so as to suit the trade?
A. Yes, sir.
Q. Sometimes you would color it more than this, would you?
A. Yes, sir; give it an abnormal color.

Mr. SEVERANCE: I move to strike out the last part of the answer.
The COURT: Motion granted.

Q. After you had so colored it and made it more pronounced yellow than this, did you still consider it butter—sold it for butter, did you?
A. Yes, sir.
Q. Then they must have sent out a variegated lot of butters, ranging from a light cream yellow to a dark yellow?
A. Yes, sir.
Q. Depending upon the tastes of the public?
A. Yes, sir; sometimes.
Q. I suppose it depended upon your taste?
A. No, sir.
Q. Not at all?
A. No, sir.
34 Q. Did you feel that you were permitting a fraud on the public in coloring butter to make it a different color than it was naturally?
A. No, sir.

Redirect examination.

By Mr. DICKINSON:

Q. How many markets did you supply?
A. Sometimes shipped to one and sometimes another.
Q. What markets did you ship to?
A. To St. Louis and New York.
Q. How about the Minnesota market?
A. We never shipped to Minnesota market except small quantities.
Q. What color would you ship to Minnesota?

Mr. SEVERANCE: I object to that as incompetent, irrelevant, and immaterial.
The COURT: Objection sustained.
Mr. DICKINSON: State rests, except Doctor Drew's testimony.

C. N. BRUNDAGE, after being first duly sworn, testified:

By Mr. SEVERANCE:

Q. Where do you live, Mr. Brundage?
A. Minneapolis.
Q. What is your business?
A. Manager of the Hammond Packing Company, Minneapolis.

Q. The Hammond Packing Company is a corporation, is it not?
A. Yes, sir.
Q. Of what State?
A. Illinois.
Q. You are working for them on a salary, are you?
A. Yes, sir.
35 Q. What is their business—the business of the Hammond Packing Company?
A. Wholesale dealers in beef, provisions, and butter.
Q. Oleomargarine?
A. Yes, sir; I mean oleomargarine.
Q. They make oleomargarine and butter both down there, don't they?
A. Yes, sir.
Q. Mr. Brundage, I will ask you whether now and on the 22d of May the Hammond Packing Company was duly licensed by the United States Government to sell oleomargarine at its place of business in the city of Minneapolis.
A. Yes, sir——

Mr. DICKINSON: I object to that as immaterial.

Q. I will withdraw that question and ask another. I will ask you if the oleomargarine kept for sale by the Hammond Packing Company at their place of business in Minneapolis, for which you are manager, is the ordinary oleomargarine which is known and recognized as an article of commerce.
A. Yes, sir; it is.
Q. Where is that oleomargarine manufactured?
A. At Hammond, Indiana.
Q. By whom?
A. The G. H. Hammond Company——

Mr. DICKINSON: I object to that as incompetent, irrelevant, and immaterial.
The COURT: Objection overruled.

Q. That is a different corporation than the Hammond Packing Company?
A. Yes, sir.
Q. Do the Hammond Packing Company buy these packages of oleomargarine from the G. H. Hammond Company?
A. Yes, sir.
Q. I will ask you where it is put up in this ten-pound package that has been introduced in evidence.
A. At Hammond, Indiana.
Q. How was it shipped to you here—that is, was it shipped as a separate original package?

Mr. DICKINSON: Objected to as immaterial, incompetent, and irrelevant.
The COURT: Objection overruled.
36 Mr. DICKINSON: Exception.

A. Yes, sir.

Q. Had that package ever been opened prior to the time Mr. McConnell and Mr. Corbett came there and bought it?

A. No, sir.

Q. Will you state what happened when they came there?

A. Why, they came there and asked for some oleomargarine—asked me to sell them some oleomargarine. I sold it to them and then asked for their address. After they had paid for it I took their address and gave them a receipt for it.

Q. Did you open it up there?

A. At their request; yes, sir.

Q. And close it up again?

A. Yes, sir.

Q. Nothing was removed from the package?

A. No, sir.

Q. That is, they picked a block out and put it right back again?

A. They picked a block out and looked at it to see what was in the package, I suppose.

Q. That box contained ten——

A. Ten one-pound bricks.

Q. How long have you been selling oleomargarine?

A. I think about ten years.

Q. For whom?

A. For Armour and Company, Chicago, and for G. H. Hammond and Company, and for Swift and Company.

Q. They are three of the largest manufacturers of oleomargarine in the country, are they not?

A. Yes, sir.

Q. You have seen other manufacturers manufacture it, besides those companies?

A. Yes, sir.

Q. I will ask you if this oleomargarine is the same color as the oleomargarine universally sold throughout the country.

A. Yes, sir.

Q. And it has always been that color, has it?

A. Yes, sir.

Q. You sell it here in ten-pound packages, do you?

A. Yes; we sell the original packages.

Q. That is what I mean.

A. Ten-pound packages, twenty, thirty, forty, and sixty-pound packages.

Q. It is sometimes put up in these packages?

A. Yes, sir.

37 Q. And in bulk?

A. Yes, sir.

Q. How is it put up then?

A. In tubs and sometimes in rolls.

Q. You never break the package?

A. Never.

Q. You said you took the name and address of these inspectors?

A. Yes, sir.

Q. How did you come to do that?
A. The Federal Government requires us to do that.
Q. You comply with the Federal laws, do you?
A. Yes, sir.
Q. You say that this package was bought at Hammond, Indiana, and shipped directly to the Hammond Packing Company, of which you are manager here in Minneapolis?
A. Yes, sir.
Q. Did it pass through the hands of any other person—any middleman?
A. No, sir.
Q. This is the first sale of this package in this State?
A. Yes, sir.
Q. And you sold it as the representative of the Hammond Packing Company?
A. Yes, sir.
Q. And as its manager?
A. Yes, sir.

Cross-examination.

By Mr. DICKINSON:

Q. Who did you order it from, Mr. Brundage?
A. G. H. Hammond Company, of Hammond, Indiana.
Q. You ordered it from the manufacturer?
A. Yes, sir.
Q. It didn't come from the Hammond Packing Company, then?
A. No, sir.
Q. Then your company didn't ship the butter in here?
A. Our company? No, sir.
Q. The Hammond Packing Company?
A. The G. H. Hammond Company shipped it in here.
Q. You don't know anything about the manufacture of oleomargarine itself, do you?
A. No, sir.
Q. Don't know anything about the constituents or the proportion or the compound made up by the constituents?
A. No, sir.
38 Q. You don't know, then, what the color of oleomargarine would be in its natural state?
A. No; only——
Q. Except as it comes to you for sale?
A. That is all.
Q. From your experience?
A. That is all.

Redirect examination.

By Mr. SEVERANCE:

Q. Your company is an Illinois corporation and has its office in Chicago, does it?
A. Yes, sir.

Q. And that company buys these products at Hammond, Indiana, from the G. H. Hammond Company?

A. Yes, sir.

Q. And your company has places of business in other States, has it?

A. Yes, sir.

Q. And whenever any oleomargarine is shipped in it comes in as the property of your company from Hammond, Indiana?

A. Yes, sir.

Q. And is shipped on your order?

A. It is shipped on our order; yes, sir. We order it.

Q. It comes by train, by rail?

A. Yes, sir.

Recross-examination.

By Mr. DICKINSON:

Q. You order it of the G. H. Hammond people, direct to Minnesota of them, and they ship it on to you?

A. Yes, sir.

Q. They deliver it to you here?

A. Yes.

Mr. SEVERANCE: They deliver it to you at Hammond, Indiana——

Mr. DICKINSON: That is objected to.

Q. As I understand it, the G. H. Hammond Company ship
39 it here to your order for the Hammond Packing Company?

A. They deliver it free on board cars at Chicago, and we pay the freight.

Mr. SEVERANCE: Do you mean Chicago or Hammond, Indiana?

A. Hammond, Indiana, I should say.

Q. You represent the Hammond Packing Company?

A. Yes, sir.

Q. You send for the order to the G. H. Hammond people and they ship it on?

A. Yes.

Q. It arrives here on the cars?

A. Yes; we pay the freight on it; we buy it f. o. b. Hammond.

Redirect examination.

By Mr. SEVERANCE:

Q. The G. H. Hammond Company send you a bill of lading from Hammond, Indiana, as soon as it is delivered there free on board cars at Hammond, Indiana; isn't that it?

A. Yes, sir.——

Mr. DICKINSON: Objected to as leading.

Q. I will ask you whether or not you receive a bill of lading of those goods as they are shipped to you, including this package in question.

A. Yes, sir.

Q. From whom?
A. The G. H. Hammond Company.
Q. Do they send it to you by mail?
A. Yes, sir.
Q. At the time the goods are delivered on the cars there?
A. Yes, sir.
Q. The goods are consigned to you?
A. Yes, sir.
Q. You pay the freight and take up the article?
A. Yes, sir.

40 Recross-examination.

By Mr. DICKINSON:

Q. How much did they pay you for this package? Their testimony was correct on that point, was it?
A. Yes, sir; I think it was; yes, sir.

WILLIAM B. RUSSELL, after being first duly sworn, testified:

By Mr. SEVERANCE:

Q. Mr. Russell, where do you live?
A. Hammond, Indiana.
Q. What is your business?
A. Foreman of the butterine department of G. H. Hammond.
Q. How long have you occupied that position?
A. Three years last March.
Q. How long have you been connected with that company?
A. Ten years in July.
Q. What is your duties as foreman?
A. To oversee the manufacture of the butterine.
Q. Is butterine and oleomargarine the same thing?
A. Virtually the same thing.
Mr. DICKINSON: Virtually? What do you mean by that?
A. Well, I will say they are.
Mr. DICKINSON: But not as it is generally accepted. There is a little difference, isn't there?
A. Yes; there is a little difference from a chemical analysis of it.
Q. You make oleomargarine there?
A. Yes, sir.
Q. Is it made there under your direction?
A. Yes, sir.

41 Q. What are the constituent parts of oleomargarine?
A. Oleo oil, neutral lard, cottonseed oil, cream and milk, butter color, and salt.
Q. Are those the same constituents ordinarily used in the manufacture of oleomargarine?
A. Yes, sir.
Mr. DICKINSON: What is that again, please?
A. Oleo oil, neutral lard, cottonseed oil, milk and cream, butter color, and salt.

Q. What butter color do you use?
A. Wells and Richardson's.
Q. Do you know whether that is a standard article used for that purpose?
A. Yes, sir; it is.
Q. Is it used by all manufacturers of oleomargarine so far as you know?

Mr. DICKINSON: That is objected to as incompetent, irrelevant, and immaterial.
The COURT: Objection sustained.
Exception taken by the defendant.

Q. I will ask you whether or not that is the same butter color that is used in creameries, if you know.

Mr. DICKINSON: Same objection.
The COURT: Objection sustained.
Exception taken by the defendant.

Cross-examination.

By Mr. DICKINSON:

Q. What does butter color consist of?
A. I don't know, sir.
Q. You don't know?
A. No, sir.
Q. Briefly, what is oleo oil?
42 A. Manufactured from the gall fat of the steer.
Q. And neutral lard is what?
A. Manufactured from the leaf lard of the hog.
Q. And what is the process of mixing this, compounding it into oleomargarine?

Mr. SEVERANCE: I object to this as incompetent, irrelevant, and immaterial, and not proper cross-examination.
The COURT: Objection overruled.
Exception taken by defendant.

Q. Just state the method of mixing these.
A. Why, they reduce the neutral lard oils to a certain temperature and run into a vat or churn and mix together with proper consistency.
Q. When is the cottonseed oil put in?
A. They are all——
Q. Which all?
A. Oleo oil, neutral lard, cottonseed oil, milk and cream, butter color, and salt.
Q. What is the butter color used for? What is it put into the mixture for, oleomargarine?

Mr. SEVERANCE: Objected to as incompetent, irrelevant, and immaterial.
The COURT: Objection overruled.
Exception taken by defendant.

A. It is put in it to color the mixture.
Q. To make it what color?
A. To make it a yellow color.
Q. Without that what would be the color of the mixture?
A. It would be a very light straw.

Redirect examination.

By Mr. SEVERANCE:

Q. This color is uniformly put in the mixture when you put the other parts in and churn it together?
A. Yes, sir.
43 Q. Oleomargarine is this color?
A. Yes, sir.
Q. Always has been?
A. Yes, sir.
Q. It don't vary at all?
A. No.

Recross-examination.

By Mr. DICKINSON:

Q. Why do you put yellow color in?

Mr. SEVERANCE: That is objected to as incompetent, irrelevant, and immaterial.
The COURT: It is already testified to.

W. N. IRISH, after being first duly sworn, testified:

By Mr. SEVERANCE:

Q. Mr. Irish, where do you live?
A. St. Paul.
Q. What is your business?
A. Secretary and treasurer of the Crescent Creamery Company.
Q. How many creameries have they?
A. We own and operate twelve, I think.
Q. All in different parts of the State of Minnesota?
A. Yes, sir.
Mr. DICKINSON: Southern part?
A. Southern and southeastern.
Q. What do you manufacture?
A. Butter and cheese.
Q. How long have you been in the business?
A. Seventeen years.
Q. How long has the Crescent Creamery Company been in business?
A. The present corporation five years or more.
Q. Before that you were connected with the predecessor of it?
A. Yes, sir.
Q. Since when?
A. Since the spring of '82.

44 Q. You are familiar with the manufacture of creamery butter, are you?

A. Yes, sir.

Q. I will ask you if you are familiar with the manner of operating creameries.

A. I am.

Q. And the manufacture of butter in creameries in the State of Minnesota?

A. Yes, sir.

Q. I will ask you whether it is customary in creameries to use coloring of any kind in making creamery butter.

Mr. DICKINSON: Objected to as incompetent, irrelevant, and immaterial.

The COURT: Objection overruled.

A. It is.

Q. What colored matter is used?

A. Well, there are different makes.

Q. What is the principal one?

A. We are using at the present time Wells, Richardson and Company's.

Q. Do you use that all the year round?

A. Yes, sir.

Q. So as to make a uniform color of butter?

A. Yes, sir.

Q. I will ask you whether the color of butter does not vary at different seasons if coloring extract is not used.

A. It does; yes, sir.

Q. I will ask you whether natural butter in the winter season isn't lighter colored than this brick of oleomargarine that is introduced in evidence.

A. Take the average butter, I should say it is lighter than that in the winter.

Q. And isn't it a fact that the average June butter without coloring with extracts is a more pronounced yellow?

A. I don't know whether the average butter would be.

Q. But it differs in different seasons, does it not, the natural butter?

A. Yes, sir; at different seasons of the year it varies from
45 the different breeds of cows and the different methods of feeding.

Q. You heard the testimony of Mr. Russell, who was on the stand here?

A. Yes, sir; I did.

Q. He spoke of Wells and Richardson's coloring?

A. Yes, sir.

Q. Is that the same what you meant you were using?

A. Yes, sir; we are now using it.

Cross-examination.

By Mr. DICKINSON:

Q. You say you use it the year round. At certain months it isn't necessary to use it?

A. Well, we use it usually the year round. At certain seasons we have to use it more than other seasons.

Q. It isn't necessary to use it during June and July, August and September—about four or five months in the year—is it?

A. Yes, sir; to a certain extent it is.

Q. Are you the secretary and treasurer?

A. Yes, sir.

Q. You aren't engaged in looking after the manufacturing?

A. I am looking after the office work, of course, but I have been in the manufacturing department a great deal.

Q. At some seasons of the year you use more of this coloring than at others?

A. Yes, sir.

Q. And that is to preserve the uniform color?

A. Yes, sir.

Q. That is the uniform grade of the color of butter?

A. Yes.

Q. What is that color—about this color?

A. Yes; that is the average, I should say.

Q. When it isn't up to that uniform grade, then it isn't what is commonly used by trade—a light color would indicate an inferior grade?

A. Yes; as it is usually accpeted by trade.

Q. How much below that is the average color of butter in the off season when you have to use the most color?

A. Well, as I say, butter varies considerably.

46 Q. Now, during the winter time about how much below that color?

A. You take the average sample of butter?

Q. Yes.

A. As I say, different cows would produce different grades.

Q. I mean the average product.

A. Take the average in the winter and it would be quite a perceptible shade lighter than that.

Q. Not a white color?

A. No; of course, there are samples of butter that is almost white, but that I don't think is the rule; it is an exception.

Q. If a person buying butter on the market and it is below what you call uniform grade, it at once becomes a suspicious article or an article which requires investigation, does it not?

A. As I stated before, take the average buyer and he likes to have the butter of a good, rich, yellow color; that is, the average buyer.

Q. That is what is known as butter color, isn't it?

Mr. SEVERANCE: That is objected to as incompetent, irrelevant, and immaterial.

Q. What is uniform color; what is that?
A. The average color, as I say, is bright butter color.

Redirect examination.

By Mr. SEVERANCE:

Q. There are a great many different shades in the color of butter?
A. Butter in its natural state, there are a great many different shades.
Q. There are some markets you ship to where they demand different shades than others?
A. Yes, sir.
Q. So you color a good deal of your butter so it is considerably darker, more pronounced yellow, than this sample here, and some not so much as this? Isn't that so?
A. Well, I presume there are seasons—take it in the spring
47 of the year, when a sample would be a richer color than that, and other seasons not quite so much. Of course, take butter in the winter and the average buyer doesn't expect to get as nice grade of butter than in the spring and summer.
Q. Do you know the color of oleomargarine?
A. No, sir.
Q. Butter varies at different seasons of the year?
A. Yes, sir.

Recross-examination.

By Mr. DICKINSON:

Q. You said a richer color. What is that?
A. A darker yellow.
Q. The darker the butter is, the richer it is; is that right?
A. You take a rich butter——
Q. Isn't it a fact that butter that is light is not as rich butter as the dark color?
A. I wouldn't say that. I suppose it will have the same amount of butter fat in as it would if it was a darker butter.
Q. The lighter butter is poorer?
A. Not in butter fats.
Q. Take the lighter butter that is only used by farmers, and it is a poorer butter, isn't it?

Mr. SEVERANCE: I object to that.

Q. That is, it isn't used on the market?

Mr. SEVERANCE: I object to that.
The COURT: If you want to make a record, go on; but this is entirely immaterial, so far as that is concerned.
Mr. DICKINSON: Well, that is all.

48 J. L. CRUMP, after being first duly sworn, testified:

By Mr. SEVERANCE:

Q. Mr. Crump, where do you live?
A. St. Paul.
Q. What is your business?
A. Manager of F. B. Fargos and Company.
Q. What do they do?
A. Sell creamery supplies, creamery machinery.
Q. How long have you been in that business?
A. Three years.
Q. Do you handle butter color?
A. We do.
Q. Whose make?
A. Wells', Richardson's, F. B. Fargos', and Hanson and Thatcher's.
Q. I will ask you if you sell any amounts of these butter colors to any persons operating creameries throughout the State.

Mr. DICKINSON: That is objected to as incompetent, irrelevant and immaterial, and no foundation laid.
The COURT: Objection sustained.

Q. You say you have been manager of F. B. Fargos and Company?
A. Yes.
Q. Three years?
A. No; I am manager at the present time; I have been in the business three years.
Q. And that company handles creamery supplies and so forth?
A. Yes, sir.
Q. And that company sells to creamery companies, do they not?
A. Yes, sir.

Mr. SEVERANCE: I think we will rest now.

49 Mr. DICKINSON: I want to recall Mr. Russell a minute for further cross-examination:

W. B. RUSSELL.

By Mr. DICKINSON:

Q. I want to know in what proportion you use this butter color to the other ingredients in the manufacture of oleomargarine.
A. Sixteen ounces to twelve hundred pounds of oleomargarine. I haven't figured it out just to the pound, but that is the proportion.
Q. You never use more than that?
A. No, sir.
Q. And that is the material you call butter color?
A. Yes, sir; Wells and Richardson's butter color.
Q. You don't use any other color?
A. No, sir.

Q. Never have since you have been connected with it?
A. Only in experimental work.
Q. This is not a package of experimental work?
A. No, sir.
Q. Is that in fluid or dry form?
A. It is in fluid form.
Q. But you don't know what it consists of?
A. No, sir; I don't; not the analysis of it.

Redirect examination.

By Mr. SEVERANCE:

Q. This stamp is dated April 29th, 1899?
A. Yes, sir.
Q. You were foreman at that time?
A. Yes, sir.
Q. So you can state that this package in question here was colored in proportions, as you have stated, with the ingredients as you have stated?
A. Yes, sir.

Mr. DICKINSON: It is considered that this brick of oleomargarine is introduced and received in evidence.
The COURT: Yes.

50 An adjournment was here taken to 10 a. m., July 10th, 1899.

JULY 10TH, 1899.

C. W. DREW, after being first duly sworn, testified:

By Mr. DICKINSON:

Q. What is your profession, Doctor?
A. Analytical chemist.
Q. How long have you been practicing that profession?
A. A portion of my time ever since 1873 has been given to it; the last number of years practically all of my time.
Q. Here in Minneapolis?
A. I have been here in Minneapolis since '81.
Q. And before that time?
A. I was a student before that time mostly.
Q. Graduated where?
A. In the chemical department of the University of Vermont, in '77, and medical department, in 1880.
Q. And you have been practicing the profession ever since, have you?
A. I have been engaged in medical practice to some extent, in teaching to some extent, and practicing chemical work the remainder.
Q. Have you a lab-ratory here in this city?
A. I have.
Q. Have you examined the oleomargarine in question here in this case?

A. I haven't examined it at all thoroughly, because I haven't had an opportunity. I have to a slight extent.

Q. I understand you didn't make a quantitative analysis.

A. I have not.

Q. You have examined a good deal of the article, have you, from time to time?

A. I have.

Q. Have your examinations of butter been extensive at all?

51 A. Yes.

Q. Are you acquainted with the product here in Minnesota?

A. I am.

Q. I will ask you what is the color, Doctor, of butter as it appears upon the market and as an article of commerce here in this city.

Mr. SEVERANCE: Objected to as incompetent, irrelevant, and immaterial and no foundation laid.

Mr. DICKINSON: Do you want to cross-examine him on that?

Mr. SEVERANCE: No, sir.

Q. Well, are you acquainted, Doctor—do you know what the color of butter is and has been in this city?

A. I have lived in Minnesota for eighteen years or nineteen years and eaten butter every day during that time, I think. I have also been connected with the State dairy and food department for six or eight years, and have examined butter during part of that time as to composition of properties, and so on.

Mr. SEVERANCE: I submit he is not an expert of butter any more than the rest of us. Same objection as before.

The COURT: Objection overruled.

Exception taken by defendant.

(Former question read:)

A. I should call the color a bright yellow.

Q. What is the color of oleomargarine, Doctor, in its pure state, free from any coloring or ingredient?

Mr. SEVERANCE: Objected to as incompetent, irrelevant, and immaterial and no foundation laid.

The COURT: Objection sustained.

Q. Do you know the constituents of oleomargarine?

A. I do.

Q. You have examined a good many samples, have you?

A. I have.

Q. Do you know the color of the different ingredients composed in the article?

A. I do.

Q. I will ask you what you found in the oleomargarine which you examined in this case, what the constituents of the oleo-

52 margarine was that you examined in this case.

Mr. SEVERANCE: Objected to as incompetent, irrelevant, and immaterial.

The COURT: Objection overruled.
Exception taken by defendant.

A. I can't say that I gave a critical examination enough to this particular sample to say much about it, any more than I should say it was oleomargarine from the character.

Q. Oleo oil and what?

A. Oleo oil with more or less neutral lard usually, commonly called, and a varying proportion of cotton-seed oil, with the mixture of a proper amount of salt, with the mixture of a varying proportion of butter derived from milk or cream, and with coloring matter.

Q. Some salt?

A. I mentioned salt. Those are the usual constituents of oleomargarine as I found it in commerce.

Q. What effect has the use of this butter color on the combination of these constituents which you have mentioned?

Mr. SEVERANCE: Objected to as incompetent, irrelevant, and immaterial, and no foundation laid.
The COURT: Objection overruled.
Exception taken by defendant.

A. What effect would the addition of butter color, so called, have to this mixture, do you mean?

Q. No. What effect would the butter color which you found in this oleomargarine have in all the constituents?

A. It imparts color, substance.

Q. What color?

A. The yellow color.

Q. Are you able to state, Doctor, what effect sixteen ounce- of what is known as butter color would have—Wells and Richardson's butter color would have upon twelve hundred pound- of oleomargarine?

Mr. SEVERANCE: Objected to as incompetent, irrelevant, and immaterial, and no foundation laid.
The COURT: He may answer.
Exception taken by defendant.

53 A. In my judgment, it would impart a bright yellow color to the preparation.

Q. A yellow color?

A. A bright yellow color.

Q. Are you acquainted with the article known as butter color, manufactured by Wells and Richardson?

A. I am.

Q. What is it, Doctor?

Mr. SEVERANCE: That is objected to as incompetent, irrelevant, and immaterial.
The COURT: Objection overruled.
Exception taken by defendant.

A. The pre-aration known on the market as Wells and Richard-

son's butter color, as found upon the market at the present time, is a solution of——

Mr. SEVERANCE: I object to that, if the court please; that isn't what he was asked.

The COURT: He may answer.

Witness continuing: It is a solution of coal-tar yellow in cotton-seed oil, principally; in fact, this particular product is that invariably. The character of it used is various in these different brands of colors. The particular one mentioned conforms to my statement, I believe.

Q. Is it known by any other name?

Mr. SEVERANCE: Objected to as immaterial.

The COURT: Objection overruled.

Exception taken by the defendant.

A. The yellow employed here is commonly known as butter yellow; the identity is not always disclosed by examination.

Q. What have you found in this particular color?

A. I have identified this particular color as coal-tar yellow. I should say it is the ordinary butter yellow used by Wells and Richardson Company, a product allied to menthol orange and other analine products.

54 Q. Do you know its use, Doctor, in manufacturing and trade?

A. Of this preparation?

Q. Yes.

A. It is used as a color for butter—it is a color for butter.

Q. What, in your opinion, Doctor, I will ask you, would be the color of this oleomargarine with the butter color left out?

Mr. SEVERANCE: Objected to as incompetent, irrelevant, and immaterial, and no foundation laid.

The COURT: He may state first whether he knows or not.

WITNESS: I know what the color would be; yes, sir.

Q. Answer.

Mr. SEVERANCE: Same objection.

The COURT: The foundation is rather meagre as to his examination of oleomargarine, I think.

Q. I speak of this oleomargarine here. To what extent have you examined oleomargarine in the last year or two?

A. Only to a very limited extent during that time. I have examined a great many samples of it while connected with the State dairy and food department, however.

Q. And that covers what period of time?

A. About seven years, I think.

Q. As I understand your testimony, it is that this particular oleomargarine is same as the others you examined?

A. I should say from my examination it was the ordinary character of the product. As I said before, I had very little opportunity

to examine critically this sample. I was called out of the city the same day that I received it, and have been absent until yesterday late.

By Mr. SEVERANCE:

Q. Have you ever been in an oleomargarine factory?

A. I don't know that I have.

Q. Have you ever seen any oleomargarine samples that
55 you examined that didn't contain any coloring matter?

A. Any uncolored matter?

Q. Yes.

A. No, I have not.

Mr. DICKINSON, continuing:

Q. As I understand, you analyzed it and separated its ingredients?

A. An analysis of oleomargarine does not consist of the separation of its ingredients. It consists of the identification of them.

Q. Do you know what its constituents are—what their color is?

A. I am familiar with the color of the constituents from which oleomargarine is made. I think from that I can judge of the color which a mixture of those constituents would have.

Mr. SEVERANCE: Wouldn't that color differ somewhat as the constituents change?

A. It undoubtedly would.

Mr. SEVERANCE: I submit the objection to the former question as incompetent, irrelevant and immaterial, and no foundation laid.

The COURT: Objection overruled.

Exception taken by defendant.

Q. What would be the color of this oleomargarine in question, leaving out the butter color?

Mr. SEVERANCE: Same objection.

The COURT: Objection overruled.

Exception taken by defendant.

A. In my judgment, it would be a light yellowish color.

56 Cross-examination.

By Mr. SEVERANCE:

Q. Professor, there are very many shades of butter, are there not?

A. Butter varies in its color; yes.

Q. From almost white to a dark yellow?

A. Are you referring to butter as it is naturally or as upon the market?

Q. Well, natural butter first.

A. As butter would be prepared without the presence of coloring matter, its color would vary widely different seasons of the year and different feed given to the cattle.

Q. It would vary from almost white, almost like lard, to almost a brilliant yellow?

A. I should say it would vary from a light yellowish color to a deep yellow.

Q. There is some butter—there is butter same color as this natural oleomargarine, if I might use that expression, which you say was a light yellowish color?

A. I think there is.

Q. Most of the butter that is made in creameries is colored, is it not?

Mr. DICKINSON: Objected to as immaterial.

The COURT: Objection overruled.

A. I think almost all butter made, anyway, is colored at different seasons of the year.

Q. In both dairies and creameries?

A. Yes.

Q. And the butter coloring depends on the extent it is used at different seasons of the year?

A. I think so; at different seasons of the year.

Q. If butter is used all the year round, it would vary at different seasons of the year?

A. It would; yes.

Q. This Wells-Richardson butter color is a well-recognized article of commerce, is it not?

A. Oh, yes; it is a standard preparation, used very extensively.

Q. It is used very extensively in coloring butter?

A. Yes.

57 Redirect examination.

By Mr. DICKINSON:

Q. This use of this coloring matter in manufacturing dairy butter is used for what purpose?

Mr. SEVERANCE: That is objected to; that is self-evident.

The COURT: Yes.

Q. And to bring it up to its uniform standard color, Doctor?

Mr. SEVERANCE: I object to that, as no foundation laid; it is speculation.

The COURT: Objection sustained.

Mr. DICKINSON: State rests.

Mr. SEVERANCE: We have no further testimony, your honor.

Testimony closed.

Upon filing the within petition, it is ordered that a writ of *habeas corpus* issue, returnable August 21st, 1899, at 2 o'clock p. m., at my chambers, in Minneapolis, Minn.

WM. LOCHREN, *U. S. Judge.*

Endorsed: Filed Aug. 21, 1899. Henry D. Lang, clerk, by Robert C. Mabey, deputy.

58 And on the same, pursuant to the order of the court, the following writ of *habeas corpus* was issued in said matter. The same was returned and filed of record herein on said day.

59 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

The President of the United States of America to Harry M. Burke, lieutenant of police, city of Minneapolis:

You are hereby commanded to have the body of C. N. Brundage, by you imprisoned and detained, as it is said, together with the time and cause of imprisonment and detention, by whatsoever name the said C. N. Brundage shall be called or charged, before Hon. William Lochren, one of the judges of the United States circuit court for the district of Minnesota, at his chamber, in the custom-house, in the city of Minneapolis, on the 21st day of August, A. D. 1899, at two o'clock p. m. of said day, to do and receive what shall then and there be determined concerning the said C. N. Brundgage.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 21st day of August, A. D. 1899. Issued at my office, in the city of Minneapolis, under the seal of said circuit court, the day and year last aforesaid.

[Circuit Court Seal.]

HENRY D. LANG, *Clerk*,
By ROBERT C. MABEY, *Deputy*.

Endorsed: Service of the within writ is admitted at Minneapolis, Minn., this 21st day of August, 1899. Harry M. Burke, lieutenant of police, city of Minneapolis. Filed Aug. 21, 1899. Henry D. Lang, clerk, by Robert C. Mabey, deputy.

60 And on the said twenty-first day of August, A. D. 1899, the following proceedings of court were entered of record in said matter, viz:

61 United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, March Term, A. D. 1899.

AUGUST 21ST, 1899.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, U. S. district judge; William H. Grimshaw, United States marshal, by Charles A. Nimocks, deputy; Henry D. Lang, clerk, by Robert C. Mabey, deputy.

In the Matter of the Petition of C. N. BRUNDAGE for a Writ of *Habeas Corpus.*

Now comes Harry M. Burke, lieutenant of police of the city of Minneapolis, Minnesota, and produces in court the said C. N. Brundage in obedience to a writ of *habeas corpus* this day issued herein.

And the said writ having been filed, with the admission of said Harry M. Burke of service thereon, Mr. C. A. Severance appears on behalf of the petitioner and Mr. H. D. Dickinson appears on behalf of the respondent.

By consent of counsel for the respective parties, it is ordered that the said Burke have until Thursday, August 24th, 1899, to make and file *nunc pro tunc* as of this day his return to said writ, and that the hearing thereon be, and the same hereby is, set for Saturday morning, August 26, 1899, at ten o'clock.

Pursuant to the agreement of counsel for the respective parties, it is by the court ordered that the said C. N. Brundage be, and he hereby is, permitted to depart this court until Saturday morning, August 26th, 1899, at ten o'clock, without bail.

62 And on the twenty-fourth day of August, A. D. 1899, the following return was filed of record in said matter *nunc pro tunc* as of August 21st, 1899, viz:

63 In the United States Circuit Court, Eighth Judicial Circuit.

UNITED STATES OF AMERICA, }
District of Minnesota. }

To the Honorable William Lochren, judge of said court:

The return of Harry M. Burke, police officer of the city of Minneapolis, in Hennepin county, Minnesota, to a writ of *habeas corpus* granted on the petition of C. N. Brundage, directed to said Harry M. Burke, as said police officer, respectfully shows—

That pursuant to said writ he produced before your honorable court, at the time indicated in said writ, the body of said C. N. Brundage, and, as and for a return as to the day and cause of his detention of the said C. N. Brundage, admits that the affidavit and complaint set forth in the petition of said C. N. Brundage herein, a copy of which is hereto attached and marked "Exhibit A," was filed with the municipal court of the city of Minneapolis, in the county of Hennepin and State of Minnesota, on the 22d day of May, 1899, and that thereupon a warrant was duly issued out of said municipal court, and the said C. N. Brundage, petitioner herein, was arrested and brought before said municipal court and duly arraigned and tried upon the charge set out in said affidavit and complaint and the said C. N. Brundage duly convicted and adjudged guilty on the 31st day of July, 1899, of the offense charged in said affidavit and complaint in the manner and upon the proceedings described and set forth in the petition of said C. N. Brundage herein, and that on said last-named date, pursuant to said judgment of said municipal court, said C. N. Brundage was sentenced by said court to pay a fine of twenty-five dollars and three dollars costs, and in default of the payment thereof to be imprisoned in the work-
64 house in the city of Minneapolis for the term of thirty days, and that by the order of said court a stay of execution of said sentence was had, which said stay expired this day; that the

said C. N. Brundage, petitioner herein, did not pay said fine nor costs imposed upon him by said court; whereupon a writ of commitment was duly issued out of said municipal court for the said C. N. Brundage, a true copy of which said writ of commitment is hereto attached and made a part of this return and marked "Exhibit B."

The said Harry M. Burke further says that the said arrest, trial, and conviction of the said C. N. Brundage, and all the proceedings of the court therein and in this return set forth, were had pursuant to and under and by virtue of the statute of the State of Minnesota entitled "An act to prevent fraud in the sale of dairy products, their imitations or substitutes, to prohibit and prevent the manufacture and sale of unhealthy and adulterated dairy products, and to preserve the public health" (chapter 295, General Laws of State of Minnesota, 1899), which said act was approved April 19, 1899; and each and all of the allegations of the said C. N. Brundage in his petition herein for said writ of *habeas corpus* are hereby denied, except as hereinbefore admitted.

Said Harry M. Burke further says that the said C. N. Brundage has been since and during the 21st day of August, 1899, to this time, and is now, held and imprisoned and in the custody of the said Harry M. Burke, pursuant to the order and sentence of the court hereinbefore referred to and by virtue of said writ of commitment, which was duly delivered to him as a police officer.

HARRY M. BURKE,
Police Officer of the City of Minneapolis.

65 STATE OF MINNESOTA, } ss:
County of Hennepin, }

Harry M. Burke, being duly sworn, upon oath says that he is the police officer and person making the above and foregoing return, and that the matters and things therein set forth are true in substance and effect.

HARRY M. BURKE.

Subscribed and sworn to before me this 21st day of August, A. D. 1899.

P. S. NEILSON,
[NOTARIAL SEAL.] *Notary Public, Hennepin County, Minnesota.*

Copy.

EXHIBIT A.

Municipal Court, City of Minneapolis.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

William C. Corbett, being duly sworn, makes complaint to the above-named court and says that on the 22 day of May, A. D. 1899, at the city of Minneapolis, in said county of Hennepin, State of

Minnesota, C. N. Brundage, then and there being, did wilfully, unlawfully, and wrongfully offer and expose for sale and have in his possession, with intent to sell, a quantity of a certain compound designed to take the place of butter and made in part from animal and vegetable oils and fats not produced from milk or cream, said compound being an article commonly known as oleomargarine and being then and there colored with a coloring matter, whereby the said article and compound was made to resemble butter,
66 contrary to the statutes in such case made and provided and against the peace and dignity of the State of Minnesota. Wherefore complainant prays that said offender may be arrested and dealt with according to law.

WILLIAM C. CORBETT.

Sworn to and subscribed and complained of before me this 24 day of May, A. D. 1899.

[Municipal Court Seal.]

HENRY N. LOHREN,
Deputy Clerk of the Municipal Court.

Copy.

EXHIBIT B.

Municipal Court, City of Minneapolis.

STATE OF MINNESOTA, } ss.:
County of Hennepin, }

The State of Minnesota to the sheriff or any constable of said county, to the chief of police or any police officer of said city, and to the keeper of the workhouse of the city of Minneapolis:

Whereas at a term of the above-named court, held in said city of Minneapolis on the 31st day of July, 1899, C. N. Brundage was duly brought before said court and charged in writing, on the oath of William C. Corbett, and by the said court duly convicted of having on the 22nd day of May, in the year of our Lord one thousand eight hundred and ninety-nine, at the city of Minneapolis, in said county of Hennepin, willfully, unlawfully, and wrongfully offered and exposed for sale and have in his possession, with intent to sell, a quantity of a certain compound designed to take the place of butter, and made in part from animal and vegetable oils and
67 fats not produced from milk or cream, said compound being an article commonly known as oleomargarine, and being then and there colored with a coloring matter, whereby the said article and compound was made to resemble butter, contrary to the statute in such case made and provided and against the peace and dignity of the State of Minnesota, and upon conviction the said court did adjudge and determine that he should forfeit and pay a fine of twenty-five dollars and three dollars costs, and in default of the payment thereof that he be imprisoned in the workhouse of the city of Minneapolis for the term of thirty days, at hard

labor; and whereas he has not paid the said fine, nor costs, nor any part thereof:

These are therefore, in the name of the State of Minnesota, to command you, the sheriff, constable, chief of police, and police officer, and each of you, forthwith to convey and deliver the body of the said C. N. Brundage into the custody of the superintendent of the workhouse of the city of Minneapolis, and you, the keeper, are hereby commanded to receive him into your custody in the workhouse of the city of Minneapolis and him there safely keep for the term of thirty days at hard labor, unless he shall sooner pay the said fine and costs, or he be thence sooner discharged by due course of law.

Hereof fail not under penalty of the law.

Witness the Honorable Andrew Holt, municipal judge, at the city of Minneapolis, Minn., this 21st day of August, A. D. 1899.

[Municipal Court Seal.]

A. E. ALLEN,
Clerk of the Municipal Court,
By P. S. NEILSON, *Deputy.*

Endorsed: Filed August 21, 1899. Henry D. Lang, clerk, by Robert C. Mabey, deputy.

68 And on the twenty-sixth day of August, A. D. 1899, the following proceedings of court were entered of record in said matter, viz:

69 United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, March Term, A. D. 1899, August 26th, 1899.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, U. S. district judge: William H. Grimshaw, United States marshal, by Charles A. Nimocks, deputy; Henry D. Lang, clerk, by G. F. Hitchcock, Jr., deputy.

In the Matter of the Petition of CHARLES N. BRUNDAGE for a Writ of *Habeas Corpus.*

The above-entitled matter coming on for argument upon the return to the writ of *habeas corpus* heretofore issued herein, Mr. C. A. Severance is heard on behalf of the petitioner and Mr. H. D. Dickinson is heard on behalf of the State, and, the argument thereof not being concluded at the hour of adjournment, it is by the court—

Ordered that further proceedings in said matter be, and the same hereby are, continued until Thursday morning, August 31st, 1899, at ten o'clock; and it is further—

Ordered that the said Charles N. Brundage be, and he is hereby, allowed to depart this court until Thursday morning, August 31st, 1899, at ten o'clock, without bail.

70 And on the thirty-first day of August, A. D. 1899, the following proceedings of court were entered of record in said matter, viz:

71 United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, March Term, A. D. 1899, August 31st, 1899.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, U. S. district judge; William H. Grimshaw, United States marshal, by Charles A. Nimocks, deputy; Henry D. Lang, clerk, by G. F. Hitchcock, Jr., deputy.

In the Matter of the Petition of CHARLES N. BRUNDAGE for a Writ of *Habeas Corpus*.

The above-entitled matter coming on for further argument upon the return to the writ of *habeas corpus*, the same is further argued on behalf of the petitioner by Mr. C. A. Severance and on behalf of the State by Mr. H. D. Dickinson, and, the argument thereof not being concluded at the hour of adjournment, it is by the court—

Ordered that further proceedings herein be, and the same hereby are, continued until Friday afternoon, September 8th, 1899, at two o'clock, then to be further argued or submitted on briefs, to suit the convenience of court and counsel; and it is further—

Ordered that the said Charles N. Brundage be, and he is hereby, permitted to depart this court until Friday afternoon, September 8th, 1899, at two o'clock, without bail.

72 And on the eighth day of September, A. D. 1899, the following proceedings of court were entered of record in said matter, viz:

73 United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, September Term, A. D. 1899, September 8, 1899.

FRIDAY MORNING.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, U. S. district judge; William H. Grimshaw, United States marshal; Henry D. Lang, clerk, by G. F. Hitchcock, Jr., deputy.

In the Matter of the Petition of CHARLES N. BRUNDAGE for a Writ of *Habeas Corpus*.

Pursuant to the agreement of counsel for the respective parties, it is by the court—

Ordered that the hearing upon the return to the writ of *habeas corpus* in the above-entitled matter be, and the same hereby is, continued until Thursday, September 21st, 1899, at two o'clock p. m.

74 And on the twenty-first day of September, A. D. 1899, the following proceedings of court were entered of record in said matter, viz:

75 United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, September Term, A. D. 1899, September 21st, 1899.

THURSDAY MORNING.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, U. S. district judge; William H. Grimshaw, United States marshal, by Charles A. Nimocks, deputy; Henry D. Lang, clerk, by G. F. Hitchcock, Jr., deputy.

In the Matter of the Petition of CHARLES N. BRUNDAGE for a Writ of *Habeas Corpus*.

The above-entitled matter again coming on to be heard upon the petition and return, the same is further argued on behalf of the said petitioner by Mr. C. A. Severance and on behalf of the State by Mr. H. D. Dickinson, duly submitted and by the court taken under advisement.

76 And on the twenty-second day of September, A. D. 1899, the following decision of the court was filed of record in said matter, viz:

77 United States Circuit Court, Eighth Judicial Circuit, District of Minnesota.

In re BRUNDAGE.

This case arises from the attempted enforcement of a statute of the State of Minnesota designed to prevent the sale or having in possession for the purpose of sale of oleomargarine colored with any coloring matter so as to resemble butter made from cream.

Section 16 of an act of the legislature of the State of Minnesota entitled "An act to prevent fraud in the sale of dairy products, their imitations or substitutes, to prohibit and prevent the manufacture or sale of unhealthy or adulterated dairy products, and to preserve the public health," approved April 19, 1899, reads as follows:

"SEC. 16. No person, by himself or his agents, or his agents or servants, shall manufacture for sale, have in his possession with intent to sell, expose or offer for sale, or sell as butter or as cheese, or as substitutes for butter or cheese, or as imitations of butter or cheese, under any name or title whatsoever, any mixture or compound, which is designed to take the place of butter or of cheese, and which is made from animal or vegetable oils or fats, or by the mixing or compounding of the same, or any mixture or compound consisting in part of butter or of cheese in mixture or combination

with animal or vegetable oils or fats, nor shall any person mix, compound with or add to milk, cream, butter or cheese any animal or vegetable oils or fats, with design or intent to make or produce any article or substance in imitation of butter or cheese, nor shall any person coat, powder or color with annatto or with any other coloring matter whatever, butterine or oleomargarine or any mixture or compound of the same, or any article or compound made wholly or in part from animal or vegetable oils or fats not produced from milk or cream, whereby the said article or compound shall be made to resemble butter or cheese, nor shall any person offer or expose for sale or sell any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall have been made, manufactured or produced within this State or in any other State or country; and the having in possession by any
78 person, firm or corporation of any article, substance or compound made, manufactured or produced in violation of the provisions of this section shall be considered as *prima facia* evidence of an intent to sell the same as butter or as cheese contrary to the provisions of this section."

The violation of any of the provisions of this act was made a misdemeanor, punishable by fine or imprisonment.

The petition and return shows that upon complaint made and filed in the municipal court of the city of Minneapolis the petitioner, Charles N. Brundage, was charged with having on the 22d day of May, 1899, at said city, wilfully and unlawfully offered and exposed for sale and having in his possession with intent to sell "a quantity of a certain compound designed to take the place of butter and made in part from animal and vegetable oils and fats not produced from milk or cream, said compound being an article commonly known as oleomargarine, and being then and there colored with a coloring matter, whereby the said article and compound was made to resemble butter;" whereupon a warrant was issued by said court upon which the petitioner was arrested, and upon trial was by said court convicted and sentenced to pay a fine of twenty-five dollars and three dollars costs or be imprisoned in the workhouse of said city for the term of thirty days at hard labor. As the petitioner did not pay the fine, he was taken into custody by Harry M. Burke, a police officer of said city, upon a warrant for his commitment to the said workhouse.

On the hearing it was admitted that all the testimony at said trial was correctly set forth in Exhibit A attached to said petition. From this testimony it appears, in brief, that the petitioner was and is the manager of the business at Minneapolis of the Hammond Packing Company, an Illinois corporation, dealing in wholesale in beef and provisions, including oleomargarine, and that on May 22d, 1899, William C. Corbett, an inspector of the State dairy and
79 food department of the State of Minnesota, asked for and purchased from the petitioner, at the place of business of said Hammond Packing Company, a ten-pound package of oleomargarine for the sum of $1.40 paid by him therefor.

The said 10-lb. package was an original package of oleomargarine manufactured by the G. H. Hammond Company, of Hammond, in the State of Indiana, the enclosure of the package being a wooden box, having thereon the revenue stamps and marks required by law, and upon the sale thereof at said Hammond was thence consigned by railroad by the said manufacturer to the purchaser, the Hammond Packing Company, at Minneapolis, where it was received by the said purchaser and sold entire in the same package to said William C. Corbett, who thereafter made in said municipal court the said complaint upon which said petitioner was prosecuted, as aforesaid. The oleomargarine so sold was the well-known article of food and of commerce of that name, entirely wholesome and fit for consumption as human food, and colored with the ordinary wholesome ingredients used in the manufacture of that article to impart to it the color of the best dairy butter. On such sale it was represented and sold as oleomargarine, which was the article asked for by the purchaser.

Oleomargarine has for some years in States like Minnesota, having large dairy interests, been the subject of hostile legislation, because it comes in competition with and is a substitute for butter, and, supplying its place at less cost, diminishes the price of that article and the profits of the dairymen, and also because of the facility with which it can by dishonest dealers at retail and keepers of inns and boarding-houses be put off as butter upon customers and patrons who desire only butter and would not knowingly use oleomargarine.

In the earlier cases in which the validity of this legislation was questioned it was sustained by the courts. It could not rest
80 on the admitted right of every State as matter of police regulation to provide for the inspection of articles of food put upon its markets and for the confiscation or destruction of such articles as were found to be deleterious or unwholesome, because the legislation referred to, of which the section above quoted of the Minnesota statute is a sample, provides for no inspection and aims to prohibit and exclude from the markets of the State an article of food presumably wholesome and fit for human consumption simply because of the fact that as customarily prepared and colored to make it attractive and marketable it is made to resemble perfectly another article of food, for which it is a substitute, and is thus liable to be mistaken for that article and to be fraudulently imposed upon consumers as that article.

In People *v.* Arensberg, 105 N. Y., 123, it was held that assuming oleomargarine to be as wholesome, nutritious, and suitable for food as dairy butter, and, in fact, the same article except as regards its origin, and that it is cheaper, yet to protect the people from deception the legislature could prohibit the sale or keeping or offering for sale of oleomargarine, to which in its manufacture a coloring matter not injurious to health had been added to make it resemble the best dairy butter. It was intimated that the legislature had the power to prohibit the like coloring of winter butter to make it resemble summer butter; and the then mooted question whether, in

case the essential ingredients of oleomargarine should produce an article identical in color and appearance with dairy butter, the legislature could require that a different color be given to oleomargarine to distinguish it from butter, was stated, but not passed upon.

Plumley *vs.* Massachusetts, 155 U. S., 461, was in all essentials like the present case. The statute of Massachusetts, under
81 which Plumley was convicted, prohibited the sale, offering, or exposing for sale, or having in possession with intent to sell any article, product, or compound made wholly or partly out of any fat, oil, or oleoginous substance or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream, with a proviso that nothing in the act should be construed to prohibit the sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter.

Plumley was the Boston agent of an Illinois firm engaged in the manufacture of oleomargarine at Chicago, and in shipping the same for sale to various towns and cities of that and other States, and there selling the same; and Plumley was convicted by the municipal court of Boston for selling one original 10-lb. package of oleomargarine shipped to him by the manufacturers, it being admitted that the article was wholesome, nutritious, and palatable, and that the acts of Congress had been complied with as to marks, words, and stamps on the package. Being taken upon writ of commitment to jail after such conviction and failure to pay the fine imposed, Plumley sued out a writ of *habeas corpus* from the supreme judicial court of Massachusetts, on the ground that he was restrained of his liberty in violation of the Constitution of the United States, claiming that the Massachusetts statute was repugnant to the clause of the Constitution providing that Congress shall have power to regulate commerce among the several States, and setting up all the grounds of invalidity which are here urged against the Minnesota statute. The supreme judicial court held that the Massachusettts statute was not in violation of the Constitution or laws of the United States, and remanded
82 the prisoner, who took the case by writ of error to the Supreme Court of the United States. That court held that the Massachusetts statute in its application to sales of oleomargarine artificially colored so as to cause it to look like yellow butter and brought into Massachusetts was not in conflict with the clause of the Constitution of the United States investing Congress with power to regulate commerce among the several States, and that a State has the power to prevent the sale of articles of food manufactured in and brought from another State, being subjects of sale and commerce, if their sale may cheat the people into purchasing something they do not intend to buy and which are wholly different from what their condition and appearance import. Among the cases cited in the opinion of the court, with apparent approval, are State *vs.* Marshall, 64 N. H., 549, and Weideman *vs.* State, 56 N. W. Rep.

(Minnesota), 688, which is the same case reported at State *ex rel.* Horgan, 55 Minn., 183. In each of these two cases the court had sustained the validity of State statutes forbidding the sale, or having in possession with intent to sell, of any article or compound made in imitation of butter or as a substitute for butter and not wholly made from milk or cream, and that is of any other color than pink.

Three of the justices of the Supreme Court, including the Chief Justice, dissented from the decision of the court in the Plumley case denying that a State may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities; but the decision of the court seemed to settle the law on the subject, and when the question of the validity of the Minnesota act of 1891—Laws of 1891, ch. 11—which in its effect forbade the sale of oleomargarine unless colored bright pink, being the identical statute which had been held valid by the Minnesota supreme
83 court in 55 Minn., 183; 56 N. W. Rep., 688, came before me in Armour Packing Co. *vs.* Snyder, 84 Fed., 136, I regarded the tenor of the Plumley decision and its apparent approval of the Minnesota and New Hampshire decisions just referred to as conclusive authority in support of the validity of the Minnesota act of 1891.

Since then the whole subject has again been considered and passed upon by the Supreme Court of the United States in Schollenberger *vs.* Pennsylvania, 171 U. S., 1, and Collins *vs.* New Hampshire, 171 U. S., 30. In the Schollenberger case it is held that oleomargarine has been recognized for nearly a quarter of a century in Europe and the United States as an article of food and commerce, and has been so recognized by acts of Congress; and being thus a lawful article of commerce, it cannot be wholly excluded from importation into a State from another State where it was manufactured, although the State into which it is introduced may so regulate the introduction as to insure purity, and that, as an incident to the right to import, the importer may personally or by his agent sell the imported article in the original packages either to dealers or consumers, and that the statute of Pennsylvania of May 21, 1885, enacting that "no person, firm or corporate body shall manufacture out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or of cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession, with intent to sell the same, as an article of food," and making such act a misdemeanor is invalid to the extent that it prohibits the introduction of oleomargarine from another State and its sale in the original package. As a fact of the first importance in determining that the manufacture of oleomargarine is a lawful pursuit, and the
84 manufactured article a legitimate subject of commerce, the court refers to the act of August 2, 1886, 24 Stat., 209, "An

act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," which levies special taxes upon manufacturers and dealers in that article, and directs the kinds and sizes of the packages and the marks, brands, and stamps to be placed thereon, and that sales thereof shall only be made in and from such original stamped packages, and for surveillance by officers of the Government over the manufacture of the article and its forfeiture if found to contain ingredients deleterious to the public health. One description of oleomargarine contained in this act includes "all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable-oil annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter."

The decision of the court in the Schollenberger case certainly goes to the extent of holding that the manufacture of oleomargarine, by the compounding of the ingredients named in this quotation from the act of August 2, 1886, is recognized by Congress as being a lawful business, and that the oleomargarine so produced is a lawful article of commerce. It follows, and is distinctly held in that case, that any act of a State legislature assuming to prohibit the importation into the State and sale there by the importers of such article in original packages is invalid, being inconsistent with the exclusive power of Congress over the subject of commerce among the several States.

Comparing sec. 16 of the Minnesota act of April 19, 1899, under which the petitioner is prosecuted, with the above quotation from the act of Congress of August 2, 1886, it is obvious that the
85 Minnesota act, by its terms, prohibits and attempts to exclude from the State oleomargarine compounded of the very materials, including coloring matters, which are described in said act of Congress as constituting lawful oleomargarine of commerce, "made in imitation or semblance of butter."

According to the decisions of the Supreme Court in the Schollenberger and Collins cases, the Minnesota act is to this extent invalid, and as the conviction and imprisonment of the petitioner rest solely upon this invalid portion of that act, the conviction was null and the imprisonment was unlawful.

The argument that oleomargarine colored to resemble butter is adulterated by such coloring, so that it may for that cause be excluded from the markets of the State under its unquestioned power to exclude any article of food which is unwholesome or deleterious, fails because there is no pretense that the coloring matter contained in the oleomargarine sold by the petitioner was unwholesome, or that the oleomargarine so colored and sold was different from the "pure oleomargarine" mentioned in the opinions of the Supreme Court referred to. 'Pure, not as containing no mixture, because oleomargarine is a compound of many ingredients, but pure in the sense of containing nothing debasing or of a character which would render the article less wholesome, valuable, or desirable.

The doctrine which has apparent support in the Plumley case, that a State may exclude from its markets and absolutely prohibit

the sale of an admittedly wholesome article of food merely because it is designedly prepared to resemble so closely another more generally desired article for which it is a substitute that persons may be easily deceived and have it imposed upon them for the other article, is plainly contrary to the holding in the Schollenberger case, and untenable since that decision, in which the court announces that "the legislative policy does not extend so far as
86 to embrace the right to absolutely prohibit the introduction within the limits of the State of an article like oleomargarine, properly and honestly manufactured."

As to whether in a case like this the court should discharge the prisoner on *habeas corpus*, or by remanding him leave him to the remedy of a writ of error, it is hardly necessary to refer to the very numerous authorities. If the imprisonment is upon regular process of a court having jurisdiction and the prosecution is had under a valid law, alleged errors cannot usually be considered upon *habeas corpus;* but if the court issuing the process under which the prisoner is imprisoned had no jurisdiction or if the prosecution is under an unconstitutional and invalid statute, the circuit court has jurisdiction to discharge the petitioner on *habeas corpus*. Even then for reasons of comity such power will seldom be exercised by the circuit court to discharge a petitioner held under process from a State court, even after conviction by the trial court, unless large interests affecting the business of many or the rights of the public are so involved that serious consequences will follow from the delay which will be caused by the prosecution of a writ of error to final decision, or unless the question has already been decided by the Supreme Court of the United States, whose decision the State court has disregarded in the proceeding.

State statutes prohibiting the importation from other States and sale of articles of commerce, especially articles of food or adapted for general use, are regarded as affecting general interests and the rights of the public; and *habeas corpus* has frequently been resorted to in cases of imprisonment for violation of such statutes. Minnesota *vs.* Barber, 136 U. S., 313; Plumley *vs.* Massachusetts, 155 U. S., 461; State *vs.* McGregor, 76 Fed., 956.

87 & 88 As this is a case of that character, and as the unconstitutionality of statutes in effect like the Minnesota statute under consideration has been adjudged by the Supreme Court of the United States in the latest cases in that court upon the subject, the petitioner will be discharged from the imprisonment complained of.

Sept. 21, 1899.

WM. LOCHREN, *Judge.*

Endorsed: Filed Sept. 22, 1899. Henry D. Lang, clerk, by Robert C. Mabey, deputy.

89 And on the same day the following judgment was entered of record in said matter, viz:

90 United States Circuit Court for the District of Minnesota
Fourth Division.

Term Minutes, September Term, A. D. 1899, September 22, 1899.

SATURDAY MORNING.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, U. S. district judge; William H. Grimshaw, United States marshal, by Charles A. Nimocks deputy; Henry D. Lang, clerk, by G. F. Hitchcock, Jr., deputy.

United States Circuit Court, District of Minnesota, Fourth Division

In re C. N. BRUNDAGE.

The above-entitled cause came on before the court upon a writ of *habeas corpus* issued by this court, based upon a petition by C. N. Brundage, representing and stating that he was unlawfully held in custody under a commitment issued by the municipal court of the city of Minneapolis, upon a judgment convicting him of having offered and exposed for sale, and having in his possession with intent to sell, a quantity of a certain compound designed to take the place of butter, and made in part from animal and vegetable oils and fats, not produced from milk or cream, said compound being the article commonly known as oleomargarine, and being then and there colored with a coloring matter whereby the said article and compound was made to resemble butter, said prosecution having been based upon the provisions of chapter 295
91 of the Laws of the State of Minnesota for the year 1899 which said law petitioner claimed was as to him void and in conflict with the Constitution of the United States.

The court duly considered the said matter, H. D. Dickinson, Esq. assistant city attorney, having appeared for the respondent, and C. A. Severance, Esq., having appeared for the petitioner.

Now, therefore, after hearing counsel and duly considering said matter, it is considered by this court that the imprisonment of said C. N. Brundage, under said writ issued out of the municipal court of the city of Minneapolis, State of Minnesota, is without authority of law and in violation of the Constitution of the United States and that the said C. N. Brundage is entitled to have his liberty; whereupon it is hereby—

Ordered that the said C. N. Brundage be, and he is hereby, discharged from said imprisonment; it being further—

Ordered, however, that the execution of this order be stayed for a period of thirty (30) days from this date, during which time said C. N. Brundage shall be allowed his liberty upon his own recognizance, as during the said hearing.

September 22nd, 1899.

WM. LOCHREN, *Judge.*

92 *Assignments of Error.*

United States Circuit Court, District of Minnesota, Fourth Division.

In the Matter of the Petition of C. N. BRUNDAGE for a Writ of *Habeas Corpus.*

Now comes the State of Minnesota, by W. B. Douglas, attorney general, and, in its appeal to the Supreme Court of the United States from the judgment in the above-entitled proceedings, assigns the following errors:

First. The court erred in discharging the prisoner on the ground that his restraint and imprisonment was unauthorized and illegal, for the reason that chap. 295 of the Laws of the State of Minnesota for the year 1899, being an act entitled "An act to prevent fraud in the sale of dairy products, their imitations or substitutes, and to prohibit and prevent the manufacture or sale of unhealthy or adulterated dairy products, and to preserve the public health," approved April 19th, A. D. 1899, is unconstitutional and void because it is in conflict with the Constitution of the United States.

Second. The court erred in holding that said act is unconstitutional and void because it is in conflict with and in violation of art. 1, sec. 8, of the Constitution of the United States, which provides that "the Congress shall have power to regulate commerce among the several States."

Third. The court erred in holding that said act of the legislature of the State of Minnesota is a violation of and in conflict with sec. 2 of art. 4 of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

93 Fourth. The court erred in holding that said act of the legislature of the State of Minnesota is in violation of and in conflict with sec. 1 of art. 14 of the Constitution of the United States, which provides that "no State shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the full protection of the laws."

Fifth. The court erred in discharging the prisoner upon the ground that said act of the State of Minnesota was not a valid and constitutional exercise of the public powers of the State.

Sixth. The court erred in refusing to sustain the said act as valid and constitutional, and in discharging the prisoner from imprisonment for a violation thereof.

Seventh. The court erred in holding that said act of the legislature of the State of Minnesota is void, and that the said municipal court was without jurisdiction of the cause aforesaid.

Eighth. The court erred in granting said writ of *habeas corpus.*

Ninth. The court erred in refusing to dismiss and discharge said writ of *habeas corpus.*

Wherefore the said State of Minnesota prays that the order and judgment of said circuit court of the United States in and for said

district made and entered in said cause on the 22d day of September, A. D. 1899, be reversed, and that the said C. N. Brundage be remanded to the custody of the said Harry M. Burke, then and there to await what shall befall him in the execution of the sentence authorized by said act and the laws of the State of Minnesota.

W. B. DOUGLAS,
Attorney General for the State of Minnesota.

Endorsed: Filed Oct. 16, 1899. Henry D. Lang, clerk, by Robert C. Mabey, deputy.

94 *Petition.*

United States Circuit Court, District of Minnesota, Fourth Division.

In the Matter of the Petition of C. N. BRUNDAGE for a Writ of *Habeas Corpus.*

To the Supreme Court of the United States and to the circuit court for the district of Minnesota, fourth division, and to the judges thereof:

The petition of the attorney general of the State of Minnesota for and on behalf of said State respectfully represents that at a regular term of the United States circuit court for the district of Minnesota begun and holden at the city of Minneapolis, in said district, on the 5th day of September, A. D. 1899, a final judgment was made by said court and entered therein at said term, and on the 22d day of September, A. D. 1899, in favor of the above-named C. N. Brundage, discharging the said Brundage upon a writ of *habeas corpus* from an imprisonment after conviction duly found by the municipal court of the city of Minneapolis, Minnesota, on the ground that chapter 295 of the Laws of the State of Minnesota for the Year 1899, entitled "An act to prevent fraud in the sale of dairy products, their imitations or substitutes, to prohibit and prevent the manufacture or sale of unhealthy or adulterated dairy products, and to preserve the public health," approved April 19th, A. D. 1899, under which said conviction was had, is unconstitutional and void; and your petitioner says that the said State of Minnesota, feeling itself aggrieved by said judgment, and being advised that manifest error appears in the proceedings and judgment in said circuit court, to the great damage of said State of Minnesota:

Now, therefore, your petitioner prays and petitions the
95 court for an order allowing the said State of Minnesota to prosecute an appeal in the above-entitled matter to the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, in order that the said judgment of the said circuit court made be reviewed by the said Supreme Court of the United States, and the errors, if any be found therein, may be corrected, to the end that said judgment may be reversed, the constitutionality of the said act of the

legislature of the State of Minnesota sustained, and the said writ of *habeas corpus* discharged, and that the said Brundage be remanded to the proper authorities of the said State of Minnesota to be dealt with according to law.

And your petitioner will ever pray.

W. B. DOUGLAS,
Attorney General for the State of Minnesota.

Endorsed: Filed Oct. 16, 1899. Henry D. Lang, clerk, by Robert C. Mabey, deputy.

96 *Order.*

United States Circuit Court, District of Minnesota, Fourth Division.

In the Matter of the Petition of C. N. BRUNDAGE for a Writ of *Habeas Corpus.*

Upon reading the petition of W. B. Douglas, attorney general of the State of Minnesota, for the allowance of an appeal on behalf of said State of Minnesota in the above-entitled matter, and after due consideration of the same—

It is ordered that the said State of Minnesota be, and hereby is, allowed an appeal in the above-entitled matter from the judgment entered therein in the above-named court on the 22nd day of Sept., A. D. 1899; and it is further—

Ordered that the clerk of the above-named court transmit forthwith to the Supreme Court of the United States a transcript of the petition of C. N. Brundage for a writ of *habeas corpus*, the writ of *habeas corpus* issued thereupon, the return thereto of the police officer, Harry M. Burke; the order and final judgment of the court thereupon, together with all other papers, entries, or orders on file in this office or appearing in the minutes in said proceedings; and it is further—

Ordered that pending the said appeal the said C. N. Brundage be allowed his liberty upon his personal recognizance, as heretofore, and that proceedings under the judgment herein appealed from be, and hereby are, stayed.

Done at the general term of the above-named court this 16th day of October, A. D. 1899.

WM. LOCHREN, *Judge.*

Endorsed: Filed Oct. 16, 1899. Henry D. Lang, clerk, by Robert C. Mabey, deputy.

97 *Bond.*

United States Circuit Court, District of Minnesota, Fourth Division.

In the Matter of the Petition of C. N. BRUNDAGE for a Writ of *Habeas Corpus.*

Know all men by these presents that we, W. B. Douglas, attorney general of the State of Minnesota, on behalf of said State, as princi-

pal, and W. J. Donahower and L. A. Rosing, as sureties, all of the county of Ramsey and State of Minnesota, are held and firmly bound unto C. N. Brundage in the sum of five hundred dollars ($500); to the payment of which, well and truly to be made to said Brundage, his executors, administrators, or assigns, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals this 11th day of October, A. D. 1899.

The condition of this obligation is such that—

Whereas the above-named State of Minnesota hath appealed from the order and judgment of the circuit court of the United States for the district of Minnesota heretofore made in these proceedings, discharging on a writ of *habeas corpus* said C. N. Brundage from imprisonment:

Now, therefore, the condition of this obligation is such that if the above-named The State of Minnesota shall prosecute its said appeal to effect and shall answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to be in full force and effect.

W. B. DOUGLAS, [SEAL.]
Attorney General of Minnesota.
W. J. DONAHOWER. [SEAL.]
L. A. ROSING. [SEAL.]

In presence of—
C. W. SOMERBY.
L. E. HATCH.

38 UNITED STATES OF AMERICA, *District of Minnesota,* } ss:

STATE OF MINNESOTA, *County of Ramsey,* } ss:

W. J. Donahower and L. A. Rosing, being duly sworn each for himself, doth depose and say that he is one of the sureties named in and who signed the foregoing bond, and that he is worth the sum of five hundred dollars ($500) over and above all his just debts and liabilities and exclusive of his property exempt from execution.

W. J. DONAHOWER.
L. A. ROSING.

Subscribed and sworn to before me this 11th day of October, A. D. 1899.

EUGENE RICE,
[NOTARIAL SEAL.] *Notary Public, Ramsey Co., Minn.*

UNITED STATES OF AMERICA, *District of Minnesota,* } ss:

STATE OF MINNESOTA, *County of Ramsey,* } ss:

W. B. Douglas and W. J. Donahower and L. A. Rosing before me personally appeared on this 11th day of October, A. D. 1899, to me

well known to be the same persons described in and who executed the foregoing bond, and did each for himself duly acknowledge that he executed the same as his free act and deed.

EUGENE RICE,
[NOTARIAL SEAL.] *Notary Public, Ramsey Co., Minn.*

99 I approve the above bond and the sufficiency of the sureties thereto.

WM. LOCHREN, *Judge.*

Dated October 16th, A. D. 1899.

Endorsed: Filed Oct. 16, 1899. Henry D. Lang, clerk, by Robert C. Mabey, deputy.

100 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to C. N. Brundage, and to Davis, Kellogg & Severance, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Minnesota, fourth division, in the matter of the petition of C. N. Brundage for a writ of *habeas corpus*, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 16th day of October, A. D. 1899, and of the Independence of the United States the one hundred and twenty-third.

WM. LOCHREN, *Judge.*

Service of this within citation and receipt of a copy thereof admitted this 19th day of October, A. D. 1899.

DAVIS, KELLOGG & SEVERANCE,
Attorneys for C. N. Brundage.

101 [Endorsed:] Ent. 451, crim. U. S. circuit court, district of Minnesota, fourth division. In the matter of the petition of C. N. Brundage for a writ of *habeas corpus*. Citation. Filed Oct. 23, 1899. Henry D. Lang, clerk, by Robert C. Mabey, deputy.

102 UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Fourth Division.

I, Henry D. Lang, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 102 pages, numbered consecutively from *a* to 101, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all

other proceedings in said cause and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

Seal U. S. Circuit Court, Dist. of Minnesota, Fourth Division.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Minneapolis, in the district of Minnesota, this 14th day of November, A. D. 1899.

HENRY D. LANG, *Clerk*,
By ROBERT C. MABEY, *Deputy*.

[10-cent U. S. internal-revenue stamp canceled Nov. 14, 1899. R. C. M.]

[Endorsed:] United States circuit court, district of Minnesota, fourth division. In the matter of the petition of C. N. Brundage for a writ of *habeas corpus*. Return to Supreme Court.

Endorsed on cover: File No., 17,571. Minnesota C. C. U. S. Term No., 159. The State of Minnesota, appellant, *vs.* C. N. Brundage. Filed November 23d, 1899.

SUPREME COURT OF THE UNITED STATES.

October Term, 1909.

No. 1[illegible]

THE STATE OF MINNESOTA,
Appellant,

v.

C. N. BRUNDAGE.

BRIEF ON BEHALF OF APPELLANT.

W. B. DOUGLAS,
Attorney General,
Attorney for Appellant.

Pioneer Printing Co., St. Paul, Minn.

18809

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

NO. 159.

THE STATE OF MINNESOTA, Appellant,

vs.

C. N. BRUNDAGE, Respondent.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

In July, 1899, the defendant C. N. Brundage was convicted by the municipal court of the City of Minneapolis, Minnesota, of the crime of offering oleomargarine for sale, in violation of the latter portion of section 16 of chapter 295 of the Laws of Minnesota for 1899. The complaint upon which the defendant was convicted reads as follows:

"William C. Corbett, being duly sworn, makes complaint to the above-named court, and says, that, on the twenty-second day of May, A. D. 1899, at the city of Minneapolis, in said county of Hennepin, State of Minnesota, C. N. Brundage, then and there being, did willfully, unlawfully and wrongfully

offer and expose for sale, and have in his possession with intent to sell, a quantity of a certain compound designed to take the place of butter, and made in part from animal and vegetable oils and fats not produced from milk or cream, said compound being an article commonly known as oleomargarine, and being then and there colored with a coloring matter whereby the said article and compound was made to resemble butter, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Minnesota.

"Wherefore complainant prays that said offender may be arrested and dealt with according to law."

The court adjudged that he pay a fine of twenty-five dollars, and in default thereof be committed to and confined for a period of thirty days in the common jail of Hennepin county, and being so committed upon failure to pay the fine imposed, the defendant sued out a writ of *habeas corpus* in the United States Circuit Court, Eighth Judicial Circuit, District of Minnesota, returnable before the Hon. William Lochren, Judge.

It is conceded that all proceedings had in the municipal court of the city of Minneapolis were regular, but the defendant in his petition for a writ of *habeas corpus* asserted that such imprisonment was unauthorized and illegal, because said act of the legislature of the State of Minnesota was in violation of:

1. Section 8 of Article 1 of the Constitution of the United States providing that "Congress shall

have power to regulate commerce among the several states."

2. Section 2 of Article 4 of the Constitution of the United States, which provides that "citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states."

3. Section 1 of Article 14 of the Constitution of the United States, providing that "no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction equal protection of the laws."

The court, upon hearing before Hon. William Lochren, Judge, on Sept. 21, 1899 (96 Federal Reporter 963), determined that portion of section 16 of chapter 295 of the Laws of 1899, under which the charge in question was predicated, to be void, upon the ground that the same was in violation of the commerce clause of the Constitution, and discharged the defendant, from which decision the State of Minnesota appeals to this Court.

The transcript of the evidence upon which the defendant was tried in the municipal court of the city of Minneapolis was attached to his petition, as well as identified in the return of the officer, and was before the Court upon the hearing now under review. (Record, fols. 7 to 57.)

It appeared that on the twenty-second day of May, 1899, the defendant not only had in his possession with intent to sell, but did expose for sale and actually sell, in the city of Minneapolis, one package containing ten pounds of oleomargarine, put up in

one-pound prints, stamped with a design of wheat sheaf, gold and yellow in color, resembling creamery butter. (Record, fols. 8 and 10.) Each print was wrapped up in tissue paper, and not marked in any manner to indicate that it was oleomargarine, although the larger package was so marked. (Fols. 8 and 10.)

Evidence was offered tending to show that which is a matter of common knowledge, and will be taken judicial notice of, namely, that in winter, under adverse conditions, butter is frequently lighter in color than in its normal condition, which is a deep yellow, often referred to in the testimony as the "standard color." It is not disputed that the mixture of oils, fats and salt known as oleomargarine is much lighter in color than high class butter, and from a mechanical analysis of the oleomargarine in question it appeared that butter color or butter yellow was used to color the same to give it the appearance of ordinary butter. (Evidence of Mr. Hummel, chemist, Record, fol. 18.)

It also appeared from the evidence that the defendant, Mr. Brundage, was the agent of the Hammond Packing Company, a corporation; that such company purchased the ten-pound package of oleomargarine in question from the G. H. Hammond Company at Hammond, Indiana; that it was never opened for any purpose, until offered for sale, and then for the purpose of inspection, after being shipped from Indiana, and that Mr. Brundage sold it as the agent of the Hammond Packing Company.

William B. Russell, foreman of the butterine department of the G. H. Hammond Company, called as a witness on behalf of the defendant, testified that butter color was put into the mixture known as oleomargarine "to color the mixture yellow," and that without it oleomargarine would be a very light straw color. (Record, fol. 42.)

ASSIGNMENTS OF ERROR.

1. The court erred in holding that a portion of chapter 295 of the laws of the State of Minnesota for the year 1899 is in violation of the Constitution of the United States, and particularly in holding that part of section 16 of said chapter which prohibits any person from "offering or exposing for sale, or selling any butterine or oleomargarine or any mixture or compound of the same or any article or compound made wholly or in part from animal or vegetable oils or fats not produced from milk or cream," which in the manufacture had been "colored with annato or any other coloring matter whatever, whereby the said article or compound was made to resemble butter," to be in violation of Article 1, Section 8 thereof, providing that Congress shall have power to regulate commerce among the several states.

2. The court erred in discharging the defendant from custody upon the ground that said act of the Legislature was not a valid exercise of the police power and also that the same is in violation of the Constitution of the United States.

ARGUMENT.

Section 16 of chapter 295 of the Laws of 1899, upon which the complaint against the defendant was predicated, reads as follows:

> "Sec. 16. No person by himself or his agents or servants shall manufacture for sale, have in his possession with intent to sell, expose or offer for sale, or sell as butter or as cheese, or as substitutes for butter or cheese, or as imitations of butter or cheese, under any name or title whatsoever, any mixture or compound, which is designed to take the place of butter or of cheese, and which is made from animal or vegetable oils or fats, or by the mixing or compounding of the same, or any mixture or compound consisting in part of butter or of cheese in mixture or combination with animal or vegetable oils or fats, nor shall any person mix, compound with or add to milk, cream, butter or cheese any animal or vegetable oils or fats, with design or intent to make or produce any article or substance in imitation of butter or cheese; *nor shall any person coat, powder or color with annatto or with any other coloring matter whatever, butterine or oleomargarine or any mixture or compound of the same, or any article or compound made wholly or in part from animal or vegetable oils or fats not produced from milk or cream whereby the said article or compound shall be made to resemble butter or cheese, nor shall any person offer or expose for sale or sell any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall have been made, manufactured or produced within this state or in any other state or country;* * * *"

I.

Only that part of section 16 of chapter 295 of the laws of 1899 above italicized was assailed in the lower court and is now before this Court for review.

Section 16 can be fairly subdivided into two parts. In the first subdivision the legislature saw fit to prohibit not only the manufacture in Minnesota, but also the sale *as butter* within the state, of any substitute for butter manufactured therein from any article other than milk or cream. In the other portion, which for convenience I have above italicized, the legislature prohibited the coloring with annato or any other coloring matter whatever any butterine, oleomargarine or any mixture or compound made wholly or in part from any animal or vegetable oils or fats not produced from milk or cream, whereby said article or compound shall be made to resemble butter, and prohibited the sale or offering for sale of any such compound, whether the same "shall have been made, manufactured or produced within this state or in any other state or country." The defendant was charged with a violation of this portion of section 16 and duly convicted therefor.

Many questions likely to arise under the first portion of the section were not before the court either upon the original trial or in the *habeas corpus* case now presented upon appeal.

Under far more drastic statutes it can be safely asserted the question is settled in this Court that

the legislatures of various states have power to absolutely prohibit the manufacture and sale of any substitute for butter which is made from animal or vegetable oils or fats other than those produced from milk or cream, where the police power was invoked and applied to such articles or compounds not only manufactured but always remaining within the state.

Powell vs. Pennsylvania, 127 U. S. 678.

Schollenberger vs. Pennsylvania, 171 U. S. 16.

In the *Powell* case the Pennsylvania statute was upheld which prohibited the sale of oleomargarine, as applied to a case where this article was not only manufactured, but always remained within the state. Under the rule here established, that portion not italicized of section 16 of the act under consideration, *must be deemed valid as applied to such articles manufactured and always remaining in Minnesota.*

This portion of the statute has never been invoked as against the sale of oleomargarine or any like compound designed in a general way to resemble butter manufactured in other states and sold by the importer in original packages; while the other clause prohibiting the sale of like compounds not made from milk or cream, but colored so as to resemble butter, was designed to prohibit the sale thereof in Minnesota, regardless of the fact that it was manufactured elsewhere.

The subdivisions of the act are severable and bear no special relation to each other. While it is in-

sisted the Minnesota act as an entirety is valid as applied to the mass of property always within the state, on the other hand statutes which are constitutional in part only will be upheld and enforced so far as they are not in conflict with the constitution, provided the prohibited parts are severable. See:

Packet Co. vs. Keokuk, 95 U. S. 80.

Bresser vs. Illinois, 116 U. S. 252.

Durca vs. Mayor, 96 N. Y. 477.

Baldwin vs. Franks, 120 U. S. 689.

State vs. Bockstruck, 136 Mo. 336.

Wis., Minn. & Pac. R. R. Co. vs. Jacobson, 21 Supt. Ct. Rep. 115.

In *Baldwin vs. Franks, supra,* at page 689, the Court, after an exhaustive review of the question, say:

> "This evidently brought that case within the rule which controls the determination of this class of questions, that the constitutional part of a statute may be enforced and the unconstitutional part rejected, 'where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail.' *Virginia Coupon Cases*, 114 U. S. at p. 305. As was said in *Louisiana vs. Allen*, 103 U. S. 80, 84: 'The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature.'"

In *Packet Company vs. Keokuk, supra*, the Court, referring to portions of an invalid ordinance, at page 89 say:

> "It may be conceded that the ordinance is too broad and that some portions of its provisions are unwarranted. When those provisions are attempted to be enforced a different question may be presented."

II.

Does the closing paragraph of section 16 of chapter 295 of the laws of 1899 violate Article 1, Section 8 of the Federal Constitution, which confers upon Congress the exclusive power to regulate commerce between States?

The issue is limited to the single question: Has the legislature of Minnesota power to prohibit the sale of any compound manufactured elsewhere, which is designed to take the place of butter, provided it is not produced from milk or cream and is so colored as to resemble the highest class of the pure article? The discussion both by court and counsel in the court below was directed to the effect of the commerce clause of the Federal Constitution upon that portion of the Minnesota act offended against by the defendant. The power of the legislatures of the various states invoked in various enactments regulating or attempting to regulate the sale of oleomargarine and like substances, has recently been considered so exhaustively in this court that I shall not trespass by presenting a full analy-

sis of the principles involved, but shall barely attempt to assist the court by marshaling a few citations from the recently decided cases.

The Minnesota act upon which a complaint against the defendant was predicated reads:

> "Nor shall any person coat, powder, or color with annatto or with any other coloring matter whatever, butterine or oleomargarine or any mixture or compound of the same, or any article or compound made wholly or in part from animal or vegetable oils or fats not produced from milk or cream, whereby the said article or compound shall be made to resemble butter or cheese, nor shall any person offer or expose for sale or sell any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall have been made, manufactured or produced within this state or in any other state or country. * * *"

Defendant was charged and convicted in a court of competent jurisdiction of the crime of having willfully, unlawfully and wrongfully offered and exposed for sale with intent to sell, "*a quantity of a certain compound designed to take the place of butter and made in part from animal and vegetable oils or fats not produced from milk or cream, said compound being an article commonly known as oleomargarine and being then and there colored with a coloring matter whereby the said article or compound was made to resemble butter, contrary to the statutes in such case made and provided,*" etc.

Upon the trial of the original case it appeared the compound, not made from milk or cream, known as oleomargarine, which was exposed for sale and sold by the defendant, was colored to resemble yellow butter with a coloring matter known as butter yellow; also that the same was put up in a ten pound package, marked oleomargarine, which contained ten unmarked prints of the article, each weighing one pound. From the final judgment of the court discharging the defendant in habeas corpus proceedings, the State appealed.

In *Plumley vs. Massachusetts*, 155 U. S. 461, this Court had under consideration an act of the legislature of Massachusetts practically identical in terms with the Minnesota provision. Section one thereof reads:

> "Section 1. No person by himself or his agents or servants shall render or manufacture, sell, offer for sale, expose for sale or have in his possession with intent to sell, any article, product or compound made wholly or partly out of any fat, oil or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream of the same; provided, that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter."

The only distinction between the statutes of Minnesota and Massachusetts (which it is submitted is not of substance) is that the Massachusetts act prohibits the sale of oleomargarine so colored as to imitate yellow butter, while the Minnesota act omits the word "yellow" from the prohibition. In *Plumley vs. Massachusetts,* this court, after an exhaustive examination of the authorities, affirmed the decision of the Supreme Court of Massachusetts, and decided that the act in question was but a reasonable exercise of the police power of the State, and was not in violation of the commerce clause of the Federal Constitution. That case presented a sale in Massachusetts, in the original package, of oleomargarine imported by the vendor from a sister State. The authority of this decision has never been shaken. In fact it was directly affirmed in the last case presented to this court, and decisions in harmony therewith, which still stand unchallenged, preceded it in various states. See

Schollenberger vs. Pennsylvania, 171 U. S. at page 17;
McAllister vs. Maryland, 72 Md. 391;
State vs. Newton, 50 Vroom. (N. J.) 535;
State vs. Bockstruck, 136 Mo. 335.

We submit the theory upon which the police power of the State is invoked is that the public is interested in being protected from any imposition likely to mislead, cheat or deceive those desiring to purchase or use butter, and that the artificial color-

ing of this compound with butter yellow so as to closely imitate the highest quality of pure butter can be but for the single purpose of deceiving.

In *Plumley vs. Massachusetts, supra*, Mr. Justice Harlan, speaking for the Court, said:

> "It has therefore been adjudged that the states may legislate to prevent the spread of crime, and may exclude from their limits paupers, convicts, persons likely to become a public charge, and persons afflicted with contagious or infectious diseases. These and other like things having immediate connection with the health, morals, and safety of the people, may be done by the states in the exercise of the right of self-defense. And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that it is a particular article of food in daily use and eagerly sought by people in every condition of life, are protected by the Constitution in making a sale of it against the will of the State in which it is offered for sale, because of the circumstance that it is an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society; and the States are as competent to protect their people against

such offenses or wrongs as they are to protect them against crimes or wrongs of more serious character. And this protection may be given without violating any right secured by the national Constitution, and without infringing the authority of the general government. A State enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several States. It is legislation which 'can be most advantageously exercised by the States themselves.' *Gibbons vs. Ogden*, 9 Wheat. 1,203."

In *Schollenberger vs. Pennsylvania, supra*, the *Plumley* case was expressly affirmed. The Court in holding the Pennsylvania statute of 1885 to be invalid, when invoked as prohibiting the sale, in any form, of an article of commerce like oleomargarine, also expressly affirmed the decision of the *Powell* case (127 U. S. 678) where the identical statute was held to be valid *as applied to sales of oleomargarine manufactured and always remaining in Pennsylvania.*

At page 14, the Court say:

"In the execution of its police powers we admit the right of the State to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the State. But in carrying out its purposes the State cannot absolutely prohibit the introduction within the State of an article of commerce like pure oleomargarine."

At page 17 the Court, referring to the *Plumley* case, further say:

> "Attention was called in the opinion to the fact that the statute did not prohibit the manufacture or sale of all oleomargarine, but only such as was colored in imitation of yellow butter produced from unadulterated milk or cream of such milk. If free from coloration or ingredient that cause it to look like butter, the right to sell it in a separate and distinct form and in such manner as would advise the consumer of the real character was neither restricted nor prohibited. The court held that under the statute the party was only forbidden to practice in such matters a fraud upon the general public; that the statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food, and that it compels the sale of oleomargarine for what it really is by preventing its sale for what it is not; that the term 'commerce among the states,' did not mean a recognition of a right to practice a fraud upon the public in the sale of an article even if it had become the subject of trade in different parts of the country. It was said that the Constitution of the United States did not take from the states the power of preventing deception and fraud in the sale within their respective limits of articles, in whatever state manufactured, and that that instrument did not secure to any one the privilege of committing a wrong against society."

It is submitted therefore, the decisions in the *Plumley* and *Schollenberger* cases are in entire harmony, and that they support the contention of appellant that the clause of the enactment of the legislature of Minnesota which alone has been invoked in this case or any other case as prohibiting

the sale in Minnesota, in original packages, of oleomargarine imported by the vendor from other states, is a valid and reasonable exercise of the police power of the state. The defendant having been duly convicted of a violation of this clause of the Minnesota act, his discharge by the learned trial court on *habeas corpus* was error.

As heretofore contended, other portions of the Minnesota act, not referring to like compounds colored so as to deceive, which in a general way prohibit sales thereof in Minnesota, are not before the court at this time for adjudication. Some of these provisions have not and probably never will be construed or invoked by the authorities of Minnesota to prohibit the importation and sale in original packages of this product. As was said in *Packet Company vs. Keokuk*, 95 U. S. 89:

> "We think a severance is possible in this case. It may be stated the ordinance is too broad and that some of its provisions are unwarranted. When those provisions are attempted to be enforced, a different question may be presented."
>
> "That a part of a law may be constitutionally invalid and the remainder of it valid, where the objectionable part may be properly separated from the other, and this is so although the valid and the invalid may be contained in the same section."
>
> *State vs. Bockstruck*, 136 Mo. 336.

The learned trial judge of the 8th Judicial Circuit, District of Minnesota in his written opinion (Record, fol. 81) declared that "*Plumley vs. Massa-*

chusetts, 155 U. S. 461, was in all essentials like the present case." His decision in discharging the defendant (Record, fols. 84 to 86) was placed upon the distinct ground that *Plumley vs. Massachusetts* was overruled in effect in the *Schollenberger* case; and upon the second ground that the Act of Congress of August 2nd, 1886, providing for the taxation, etc., of oleomargarine, in defining this compound included as one of the ingredients, annatto and other coloring matter and therefore the sale of oleomargarine could not be prohibited. In defining his position, the learned judge (Record, fol. 85) says:

> "The doctrine which has apparent support in the *Plumley* case, that a state may exclude from its markets and absolutely prohibit the sale of an admittedly wholesome article of food, merely because it is designedly prepared to resemble so closely another generally desired article for which it is a substitute, that persons may be easily deceived and have it imposed upon them for the other article, is plainly contrary to the holding in the *Schollenberger* case and untenable since that decision in which the court announced that 'the legislative policy does not extend so far as to embrace the right to absolutely prohibit the introduction within the limits of the state of an article like oleomargarine properly and honestly manufactured.'"

The court overlooked the distinction pointed out by this court in the *Schollenberger* case, immediately following the above quotation, that the term "honestly manufactured" is not used in the sense understood by him.

Again the learned trial judge overlooked the fact that the Act of Congress referred to, of August 2, 1886, was by this court in *Plumley vs. Massachusetts* construed as not granting to those who pay taxes prescribed by it, the right to engage in the manufacture or sale of oleomargarine in any State which lawfully forbids such manufacture or sale, or to disregard any regulations which a state may *lawfully prescribe in reference to that article,* and that that act was not intended to be and is not a regulation of commerce among the states. This court at page 465 say:

> "The learned counsel for the appellant states that Congress in the act of August 2, 1886, has legislated fully on the subject of oleomargarine. This may be true so far as the purposes of that act are concerned. But there is no ground to suppose that Congress intended in that enactment to interfere with the exercise by the State of any authority they could rightfully exercise over the sale within their respective limits of the article defined as oleomargarine. The statute imposed certain special taxes upon manufactures of oleomargarine, as well as upon wholesale and retail dealers in that compound. And it is expressly declared (sec. 3) that sections 3232 to 3241 inclusive and section 3243 of the Revised Statutes, Title Internal Revenue, 'are, so far as applicable, made to extend to and include and apply to the special taxes' so imposed, 'and to the persons upon whom they are imposed.' Section 3243 of the Revised Statutes is in these words: *'The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by*

> *the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law;* nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.' It is manifest that this section was incorporated into the act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in reference to that article. *License Tax Cases*, 5 Wall. 462; 474; *Pervear vs. Commonwealth*, 5 Wall. 475; *United States vs. Dewitt*, 9 Wall. 41. Nor was the act of Congress relating to oleomargarine intended as a regulation of commerce among the States. Its provisions do not have special application to the transfer of oleomargarine from one State of the Union to another."

Again the decision in the *Plumley* case in this particular was expressly affirmed in *Schollenberger vs. Pennsylvania, supra,* where the Court at page 18 say:

> "The act of Congress, above cited, was referred to by the counsel for the appellant in the *Plumley* case, as furnishing a full system of legislation upon the subject, and he claimed that it excluded any legislation on the same

subject by the State, but it was held that there was no ground to suppose that Congress intended by that enactment to interfere with the exercise by the State of any authority they could rightfully exercise over the sale within their respective limits of the article defined as oleomargarine, and, as section 3243 of the Revised Statutes was referred to in the act, it was held that the section was incorporated in the act for the purpose of making it clear that Congress did not intend to restrict the power of the State over the subject of the manufacture and sale of oleomargarine within their respective limits.

"The taxes prescribed by that act were held to have been imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine within any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in reference to that article. It was also held that the act of Congress was not intended as a regulation of commerce among the States."

By the provision under consideration the legislature did not prohibit absolutely the sale of oleomargarine in Minnesota, but on the other hand, rightfully prohibited the sale of any such article not made from milk or cream if colored so as to resemble butter and thereby deceive.

The defendant is not prejudiced by the conditions of any other enactment which evidences the policy of the state affecting other questions incident to the manufacture of this article.

The sale in question of a ten pound package containing ten separate unmarked prints of oleomar-

garine so colored as to resemble the highest grade of butter made from pure milk or cream, was clearly calculated to prejudice and mislead the public.

It is therefore submitted the question presented is settled in this court; that the act of the legislature of Minnesota does not violate any provision of the Federal Constitution and that the judgment of the Court appealed from should be reversed.

W. B. DOUGLAS,
Attorney General,
Attorney for Appellant.

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No. 159.

Brf. of Guthrie & Veeder for Appellee.

Office Supreme Court U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Feb. 28, 1901.

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THE STATE OF MINNESOTA,
Appellant,

vs.

C. N. BRUNDAGE.

Appeal from the Circuit Court of the United States for the District of Minnesota.

BRIEF ON BEHALF OF APPELLEE IN SUPPORT OF CONTENTION THAT THE OLEOMARGARINE ACT OF MINNESOTA IS UNCONSTITUTIONAL AS TO INTERSTATE COMMERCE.

WILLIAM D. GUTHRIE,
ALBERT H. VEEDER,
Of counsel for appellee.

WASHINGTON, February, 1901.

[17,571.]

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STATEMENT OF FACTS.

The question in this case arises under the commerce clause of the Constitution of the United States, and involves the constitutionality of certain provisions contained in the act of the legislature of Minnesota approved April 19, 1899, entitled: "An act to prevent fraud in the sale of dairy products, their imitations or substitutes, to prohibit and prevent the manufacture or sale of unhealthy or adulterated dairy products, and to preserve the public health" (Gen. Laws Minnesota, 1899, ch. 295, pp. 365, 371). Section 16 of that act reads as follows (record p. 49):

> "SEC. 16. No person by himself or his agents or servants shall manufacture for sale, have in his possession with intent to sell, expose or offer for sale, or sell as butter or as cheese, or as substitutes for butter or cheese, or as imitations of butter or cheese, under any name or title whatsoever, any mixture or compound, which is designed to take the

place of butter or of cheese, and which is made from animal or vegetable oils or fats, or by the mixing or compounding of the same, or any mixture or compound consisting in part of butter or of cheese in mixture or combination with animal or vegetable oils or fats, nor shall any person mix, compound with or add to milk, cream, butter or cheese any animal or vegetable oils or fats, with design or intent to make or produce any article or substance in imitation of butter or cheese, nor shall any person coat, powder or color with annatto or with any other coloring matter whatever, butterine or oleomargarine or any mixture or compound of the same, or any article or compound made wholly or in part from animal or vegetable oils or fats not produced from milk or cream, whereby the said article or compound shall be made to resemble butter or cheese, nor shall any person offer or expose for sale or sell any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall have been made, manufactured or produced within this state or in any other state or country; and the having in possession by any person, firm or corporation of any article, substance or compound made, manufactured or produced in violation of the provisions of this section shall be considered as *prima facie* evidence of an intent to sell the same as butter or as cheese contrary to the provisions of this section."

The violation of any of the provisions of this act was made a misdemeanor, punishable by a fine or imprisonment (sec. 30).

It appears from the record that Brundage was arrested upon a warrant issued out of the Municipal Court of the city of Minneapolis, upon the complaint of William C. Corbett, an inspector of the State Dairy and Food Department of the state of Minnesota, which charged that on the 22d day of May, 1899, at the city of Minneapolis, said Brundage wilfully, unlawfully and wrongfully

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offered and exposed for sale, and had in his possession with intent to sell, a quantity of "a certain compound designed to take the place of butter, and made in part from animal and vegetable oil and fats not produced from milk or cream, said compound being an article commonly known as 'oleomargarine,' and being then and there colored with a coloring matter, whereby the said article and compound was made to resemble butter, contrary to the statutes in such case made and provided and against the peace and dignity of the state of Minnesota" (record, p. 1).

On the trial, it was shown that, at the time of the alleged offense, Brundage was the manager at Minneapolis, Minnesota, of the Hammond Packing Company, a corporation having its principal place of business in Chicago, Illinois, and there engaged in the manufacture and sale of oleomargarine, and that, as such manager, he sold to William C. Corbett, an inspector of the State Dairy and Food Department of the state of Minnesota, at the place of business of said Hammond Packing Company in Minneapolis, a ten-pound package of oleomargarine in the form in which it was packed in Hammond, Illinois, by the manufacturer, the G. H. Hammond Company (record, pp. 3-5, 25-26). The article sold was in its original package and was the oleomargarine of commerce known and dealt in as an article of food, and was in the form of package and with the labels required by the act of Congress of August 2, 1886 (c. 840; 24 Stat. 209), entitled "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine" (record, pp. 8-9). The package was exactly the same in size, form and number of pounds of oleomargarine as the package in *Schollenberger* v. *Pennsylvania*, 171 U. S. 1. It appears from the record that all the provisions of the Minnesota

statute in regard to indicating the true character of the article sold, etc., had been complied with, and that the G. H. Hammond Company had paid the special United States tax imposed by the act of Congress, and had complied with all the requirements of that act in respect to the manufacture and sale of oleomargarine, to the character and weight of packages used in interstate commerce and to their labeling or stamping in order to prevent deception. The record further shows that the purchaser asked for oleomargarine, and that the article he received was represented to be oleomargarine (record, pp. 5, 10). There is no feature of deception in the case, and there is absolutely no proof that the oleomargarine in question was unwholesome in the slightest degree, or was sold under circumstances calculated to deceive.

The protection of the Federal Constitution was set up on the trial in the state court (pp. 4, 5), and the judge of that court adjudged after trial that Brundage was "guilty of the alleged offense charged in said complaint, and that he pay a fine of $25, or in default thereof that he be committed for a period of thirty days and confined in said workhouse, which is the common jail of said city of Minneapolis" (p. 2). Brundage refused to pay the fine, and was committed to the jail (p. 2). He then petitioned the Circuit Court of the United States for a writ of *habeas corpus*, alleging, among other things, that his restraint and imprisonment were unauthorized and illegal, because "the said act of the legislature of the State of Minnesota is in violation of Article I., Section 8, of the Constitution of the United States, which provides that 'the Congress shall have power to regulate commerce among the several States'" (p. 3).

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The circuit court, Lochren, J., granted the petition for a writ of *habeas corpus*, on the ground that "the Minnesota act, by its terms, prohibits and attempts to exclude from the state oleomargarine compounded of the very materials, including coloring matters, which are described in the act of Congress of August 2, 1886, (24 Stat. 209)," and that "the conviction and imprisonment of Brundage rest solely upon the invalid portion of the act; that is to say, the portion attempting to exclude oleomargarine from the state" (record, p. 54). The practice in applying for the discharge of the prisoner was the same as that followed in *Minnesota* v. *Barber*, 136 U. S. 313. From the order discharging Brundage from imprisonment, the state has appealed to this court. The following argument is submitted in support of the ruling below.

I.

The fundamental rules which govern the cases constantly arising under the commerce clause of the Constitution of the United States have been elucidated by many cases, and it is unnecessary to enter upon any discussion of the general scope and operation of that clause. The difficulty of the subject no longer springs from any uncertainty as to the principles of constitutional law involved, but from the proper application of those principles to the individual case presented. That the power of Congress to regulate commerce is exclusive, that its silence in respect to any matter of interstate commerce is equivalent to a declaration that it should be absolutely free, and that any legislation by the states interfering with interstate trade in articles of commerce is void, are general propositions which are now well settled. And it is also settled that the legislature of any state may, for the purpose of protecting the community from unwholesome food,

deleterious commodities or fraud and deception, enact such reasonable legislation as it may deem proper and as may be fairly necessary, even though thereby interfering to some extent with interstate commerce. But whenever a state, under its police powers, attempts to interfere with the sale of articles of commerce, it must appear that the legislation in each case is reasonably calculated to protect the health of the people or to prevent fraud and deception. If it appear that the statute as a whole is necessary for the protection of the community, it will be sustained. To that extent may the state legislate upon interstate commerce, and thus incidentally and indirectly regulate it. But it can go no further. "It may not, under the cover of exercising its police powers, substantially prohibit or burden either foreign or interstate commerce."[1]

Examining the facts in the case at bar in the light of these principles, we find that oleomargarine is a recognized subject of commerce, that it is wholesome and nutritious, and that it furnishes a cheap and proper substitute for butter; and we also find that the Minnesota statute of 1899 does not, in the slightest degree, concern inspection or the health of the community. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 14; *Collins* v. *New Hampshire*, 171 U. S. 30, 33. Moreover, it further appears in the record that all the regulations contained in the act of Congress of August 2, 1886, had been complied with. The provisions of that act constitute a complete system for the regulation of interstate traffic and trade in oleomargarine, for the exclusion of deleterious ingredients, and for the prevention of fraud. The object of the

[1] Mr. Justice Strong in *Railroad Co.* v. *Husen*, 95 U. S. 465, 472; see, also, *Minnesota* v. *Barber*, 136 U. S. 313, 320.

act as expressed in its title was not merely to tax, but to regulate, viz. (24 Stat., 209):

> "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine."

And sections 6 and 14 of the act provide:

> "That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. . . .
>
> "The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, and composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Commissioner of Agriculture; and the decisions of this board shall be final in the premises."

Other sections carefully provide for the enforcement of the provisions of the act, and furnish a complete system for protecting the public in wholesale and retail dealings against fraud and deception, as well as against "ingredients deleterious to the public health." There can be no fraud and no deception in any form if the act of Congress be complied with. To repeat, as, in the case at bar, it was

established that all the requirements of the act of Congress had been complied with, it may be reasonably implied that the oleomargarine did not contain "ingredients deleterious to the public health" in the absence of all proof to the contrary (record, pp.8–9, 28).

II.

The controversy is, therefore, narrowed to the inquiry whether the state statute now before the court was, on the one hand, enacted for the purpose of preventing fraud or deception, or was, on the other hand, really enacted for the purpose of prohibiting and preventing trade in a legitimate article of commerce simply because it has become a suitable substitute for butter and successfully competes with it.

The Minnesota statute declares that the sale of oleomargarine within the borders of that state shall be a criminal offense. It is not an inspection law. The prohibition of sale or keeping for sale is absolute, and does not depend upon the purity or impurity of the article, nor does it necessarily depend upon the use of coloring matter so as to make oleomargarine resemble butter. The statute forbids the sale of oleomargarine in any form, even if free from any coloration or ingredient that causes it to look like butter, so long as it is sold "as a substitute for butter or cheese," which is the sole use to which it is put and for which it is manufactured and sold. One class of property is thus singled out from other property to be destroyed; and one class of business men is thus singled out from others, to be prosecuted as criminals if they attempt to carry on a legitimate trade in a recognized article of interstate commerce.

The governmental power of the states, called the "police power," which extends to the uncompensated de-

struction or impairment of property and business, finds its origin and sole justification in the principle that every person ought to use his property or conduct his business in such a manner as not to injure his neighbors, and in the principle correlative to this, that private interests must be made subservient to the general welfare of the community. Otherwise stated, the police power is founded upon and is solely justified by public necessity, and has, therefore, been styled "the law of overruling necessity." Public necessity, in the sense of that which supplies the reason of the police power, is exactly coextensive with the protection of the public against the wrongful acts of its individual members. In such cases, the exercise of the power is in immediate connection with the protection of persons and property against injurious acts of other persons, and is essentially self-defensive. The acts of protection are sanctioned and supported by the great principle of securing the public safety.

Now, in the case at bar, we are not concerned with police laws which, enacted to promote the general peace and order of society, operate equally upon all property and all persons. The present inquiry concerns the necessity which is to support the validity of a special act—an act which singles out for the purpose of destruction a particular class of property and business or the property or trade of a particular class of persons. Such an act is in its nature exceptional and if it be not sustained by a necessity reasonably commensurate with evils which the public would otherwise suffer, it is arbitrary, that is to say, an act without reason—an exercise of power and not of right. As was said in the opinion of this Court, by Mr. Justice Miller in *Chy Lung* v. *Freeman et al.*, 92 U. S., 275, 280:

"Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity."

And in *Mugler* v. *Kansas*, 123 U. S., 623, 661, Mr. Justice Harlan used the following language so often quoted:

"If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In *Railroad Co.* v. *Husen*, 95 U. S. 465, 472, Mr. Justice Strong said:

"While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine, and *reasonable* inspection laws, *it may not interfere* with transportation into or through the state, *beyond what is absolutely necessary for its self-protection.* It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

In *Minnesota* v. *Barber*, 136 U. S., 313, 320, Mr. Justice Harlan said:

"Underlying the entire argument in behalf of the state is the proposition, that it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. . . . It may be the opinion of some that the presence of disease in animals, at the time

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of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained. But if, as alleged, the inspection of fresh beef, veal, mutton, lamb or pork will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the state to enact. On the contrary, the enactment of a similar statute by each one of the states composing the Union would result in the destruction of commerce among the several states, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease."

And in *Lawton* v. *Steele*, 152 U. S. 133, 137, Mr. Justice Brown said:

"To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

The necessary and natural operation of the Minnesota statute is an unreasonable discrimination between two legitimate food products—the exclusion of one (oleomargarine) from the markets of the state, and a consequent destruction or impairment of its value, to the end that the other (butter) may advance in value, by virtue of the monopoly thus granted, far beyond the price which would follow honest competition. Let us suppose that, in a state where the dairy interests were not in a majority and therefore dominant, a statute should be passed restricting

or prohibiting the sale of butter, because the local industry in oleomargarine would thus be benefited. Would such an act stand? Suppose, also, by way of illustration, that a state whose soil was adapted to the growth of wheat but not of corn should, in order to protect its wheat growers, enact that, because corn is largely used in the manufacture of bogus and adulterated sugar, the sale of corn as an article of food be prohibited; or that Vermont, in order to protect its maple-sugar crop, should prohibit the sale of all sorghum sugar; or that Pennsylvania should prohibit the sale of bran flour because it is used to adulterate mustard; or that West Virginia should prohibit the sale of all anthracite coal "designed to take the place of bituminous coal as an article of fuel"; or that Louisiana should prohibit the use of beet sugar or glucose or saccharine because these may be used as substitutes for the local product of cane sugar. Can it be supposed for a moment that such prohibitions would be upheld in so far as they related to the sale of articles of interstate commerce?

The police power of a state can, of course, be exerted to prevent deception and fraud; but the utmost extent to which deception may reach in some cases can never justify the prohibition of an article not at all injurious or deceptive. This act prohibits sales of an article not calculated or intended to deceive, manufactured with precautions and methods which now insure its wholesomeness and under the supervision of federal officers whose duty it is to prevent deleterious ingredients, and sold under regulations which absolutely preclude the idea of deception in the sale. In the case at bar the state officer who sought to trap Brundage *actually asked for oleomargarine and got what he*

asked for in an original package of interstate commerce (record, pp. 5, 10). If any one is deceived by oleomargarine into eating it for butter, neither the manufacturer nor the dealer, wholesale or retail, is at fault (see sec. 20 of the Minnesota act). No fraud has been perpetrated and no injury has been done. The ordinary person will have knowledge, as of notorious facts, that oleomargarine is wholesome and nutritious, and is designed to take the place of butter because in its natural form it is a legitimate and desirable substitute for butter in the opinion of those who cannot afford the more expensive article, that it is used as such all over the world, that it is an important subject of traffic and of interstate and foreign commerce, and that the federal government derives a large annual revenue from the taxation of this article, the regulation of its manufacture and the licensing of those engaged in the business. If any person having such knowledge—and every person is charged with it—prefers oleomargarine to butter, he should be at liberty to make the choice; and, if he be too poor to buy good butter, he should be at liberty to procure at low prices good oleomargarine, which is a wholesome and palatable substitute for butter. Can it be said that, in order to protect the dairy interests of a state, the right to buy oleomargarine may be denied to those who prefer oleomargarine or who are too poor to buy butter, and that, in order to promote a virtual monopoly in an article of food, the property of those who would encroach upon that monopoly by selling a cheaper substitute may be destroyed, or, to put it in other words, that, in order to protect the business and products of one state, the business and products of another state may be excluded?

III.

The Attorney-General of Minnesota apparently recognizes the weakness of the act in question, as constituting a prohibition and not a regulation, for he attempts to divide section 16 of the act of 1899 into two parts or subdivisions. Under the first head or subdivision, he would place the provision that oleomargarine or any *substitute* for butter shall not be manufactured or sold or offered for sale, which is clearly an absolute prohibition, irrespective of coloring matter; and under the second head, the provision that oleomargarine shall not be sold when colored to resemble butter. The former subdivision, he argues, may be upheld by assuming that it was only intended to apply to manufacture and sale wholly within the state, and the latter by assuming that it alone was intended to apply to interstate commerce. The object of this separation of the act is, if possible, to sustain the legislation, in respect of the first subdivision, by the authority of *Powell* v. *Pennsylvania*, 127 U. S., 678, and, in respect of the second subdivision, by the authority of *Plumley* v. *Massachusetts*, 155 U. S. 461.

In order to sustain these contentions, it is necessary to insert in the statute language which the legislature did not see fit to employ, and probably deliberately omitted; and it is necessary likewise wholly to disregard the language which follows in the same section both of these so-called separable clauses, and which renders it perfectly clear that the intention was to apply the whole section to interstate commerce, and to prohibit all dealings in oleomargarine. The language to which we refer is at the close of section 16, as follows:

> "Nor shall any person offer or expose for sale or sell any article, substance or compound made, manu-

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factured or produced in violation of the provisions of this section, *whether such article, substance or compound shall have been made, manufactured or produced within this state or in any other state or country;* and the having in possession by any person, firm or corporation of any article, substance or compound made, manufactured or produced in violation of the provisions of this section shall be considered as *prima facie* evidence of an intent to sell the same as butter or as cheese contrary to the provisions of this section."

Section 16 of the act of 1899 was clearly intended to operate as a whole, and now to limit one portion to local manufacture and trade, and another portion to interstate commerce, obviously "would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact."[1] Moreover, the language of the complaint clearly shows that it was drawn with reference to the act as a whole, and not with reference to any specific part (records, p. 1).

Taking the act as a whole, can there be any doubt either as to its object or as to its effect? The object was to prohibit the sale of oleomargarine within the state; and the provisions of the act compass that object. The test is whether Brundage could comply with the law and sell oleomargarine, colored or uncolored, pure or impure. We submit that he could not.

The case of *Powell* v. *Pennsylvania*, 127 U. S., 678, 684 (decided in April, 1888), is distinguished from the case at bar not only upon the ground that it had relation solely to internal trade and traffic, but also for the reason that the basis of the decision was the assumption of fact "under the circumstances disclosed in the record" that "most kinds of oleomargarine butter in the market

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1 *Poindexter* v. *Greenhow*, 114 U. S. 270, 305.

contain ingredients that are or may become injurious to health." There is no proof whatever of this fact in the case at bar, and the progress in science and manufacture has made it impossible that any such fact should be true at the present time (*Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 9, 15). Moreover, the act of Congress has made it the duty of government officials to prevent deleterious ingredients (c. 840, sec. 14; 24 Stat. 212).

The case of *Plumley* v. *Massachusetts*, 155 U. S. 461, is likewise distinguishable not only on the facts, but on the statute. A simple comparison of the Massachusetts act with the Minnesota act now before the court will at once show the substantial difference between the two statutes. The Massachusetts act showed on its face that the only purpose of the legislation was to prevent fraudulent "*imitation* of yellow butter." And as Mr. Justice Harlan stated, in the opinion of the court (at p. 461), the act "does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure, unadulterated milk or cream of such milk. If free from coloration or ingredient that 'causes it to look like butter,' the right to sell it 'in a separate and distinct form, and in such manner as will advise the consumer of its real character,' is neither restricted nor prohibited."[1]

Now, these remarks contain the essence of the decision in the *Plumley* case and point the very distinction between that case and such cases as the *Schollenberger* and *Collins* cases and the case at bar. The Minnesota act does prohibit and was intended to prohibit the sale of all oleomargarine, no matter where manufactured. The Massa-

[1] See also Mr. Justice Peckham's remarks on the *Plumley* case in *Schollenberger* v. *Pennsylvania*, 171 U. S., at p. 17.

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chusetts statute under consideration in the *Plumley* case contained the express proviso:

> "*Provided*, that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter" (Mass. Stats., 1891, ch. 58, p. 695; Supp. 1889–1895, p. 396).

This proviso, to which the utmost importance was attached by this court, is utterly lacking from the Minnesota statute now before the court. Yet, notwithstanding this omission, the contention on behalf of the state is that the act should nevertheless be read as if it in fact did contain the Massachusetts proviso.

Although it is not urged that the *Schollenberger* and *Collins* cases actually overruled the *Plumley* case, it is submitted that the language of the latter cases most persuasively shows that the court will confine the doctrine of the *Plumley* case to the facts appearing in that case and will not extend it to other cases where the vital and essential features of the proviso of the Massachusetts statute will not be found.

The Minnesota legislature in 1899 may reasonably be presumed to have had the Massachusetts statute in mind. The Minnesota act of 1899 was enacted because the legislation then existing, known as the "pink" law, was void because in conflict with the recent decision of this court in *Collins* v. *New Hampshire*, 171 U. S. 30.[1] At the time the act of 1899 was passed, nineteen states were, and are now, regulating the manufacture and sale of oleomargarine under the provisions of the Massachusetts statute, which had been upheld by this court, and is now in

[1] *Armour Packing Co.* v. *Snyder*, 84 Fed. Rep. 136, 138.

satisfactory operation in those nineteen states.[1] The Minnesota legislature did not adopt the form of the Massachusetts statute because it was not prohibitory.

It is, of course, quite evident why the Massachusetts proviso or its substance was not inserted in the Minnesota statute. It would have clashed with what preceded and would have nullified what was expressed and intended. The declared purpose of the section, if we understand the meaning of language, was to prohibit the manufacture or sale, not merely of an imitation of butter or cheese, but of any "substitute for butter or cheese," whether or not colored to imitate or resemble butter. In view of this, what sheer absurdity it would have been to add the Massachussetts proviso which we have quoted above. The first portion of section 16 of the act now before the court could not possibly stand with any such proviso.

It is, therefore, submitted that in determining the validity of this statute, the saving proviso in the *Plumley* case cannot be implied or read into the Minnesota statute, and that it follows that the act now in question is not at all analogous to the Massachusetts statute which was sustained by this court.

IV.

As to the contention that the act may be separated and the absolute prohibition of manufacture or sale of any *substitute* for butter held constitutional as to local or domestic manufacture and sale, and the inhibition of the use of coloring compounds alone held to apply to interstate commerce, the sufficient answer must be that the language used by the legislature utterly fails to indicate the intention to create or draw any such distinction.

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[1] See Appendix.

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To insert limiting provisions into this act, in the first place limiting the prohibitory feature to local manufacture and sale, and, in the second place, implying in respect of interstate commerce the proviso of the Massachussetts statute, would be to make a new law, which is not within the judicial province. A court cannot, for the purpose of making an act valid, put words into it or imply limitations which the legislature has omitted—and presumably with design. Such a form of judicial construction would be nothing less than judicial legislation; it would be making the law and not declaring it; it would be amending the law and not construing it.

In *United States* v. *Reese et al.*, 92 U. S. 214, 221, an act of Congress, passed May 31, 1870 (16 Stat., 140), provided for the punishment of election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. The court was of opinion that Congress had constitutional power to punish such denial only when it was on account of race, color or previous condition of servitude. It was urged, however, that the general description of the offense included the more limited one, and that the section was valid where such was, in fact, the cause of denial. But the court said through Chief Justice Waite:

> "We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so

as to make it specific, when, as expressed, it is general only. . . . *To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.*"

In the *Trade-Mark Cases*, 100 U. S. 82, 98, 99, an act of Congress provided for the registration of trade-marks generally without limiting their use to commerce between the states or with foreign countries. The defendants were indicted for violating the provisions of this act. It was suggested that if Congress had power to regulate trade-marks used in commerce with foreign nations and among the several states, the statute should be held valid in that class of cases, if no further. The court (Miller, J.) said:

"While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body" (p. 98). . . . "*If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation,* and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law." (p. 99).

The act was, therefore, held to be wholly unconstitutional.

In *Tiernan* v. *Rinker*, 102 U. S. 123, a statute of Texas provided that a license fee should be paid by those selling wines except those grown in the state.

The court (Field, J.) held that it was not competent to distinguish against wines grown elsewhere, that the court could not impose the tax upon domestic wines because the legislature had made no such enactment, and that the effect of their exception was, therefore, to relieve all wines from taxation.

In *Allen* v. *Louisiana*, 103 U. S. 80, 83, the constitution of Missouri provided that a city might subscribe in aid of a railroad in case the general assembly granted authority for that purpose upon the assent of two-thirds of the qualified voters. An act was passed by the general assembly authorizing the city of Louisiana to subscribe to the capital stock of a railroad company upon the assent of a majority of the resident taxpayers. It was held that the court could not strike out this limitation and insert the limitation required by the constitution. The court said (Waite, C. J.):

> "It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. 'But,' as was said by Chief Justice Shaw, in *Warren* v. *Mayor and Aldermen of Charlestown*, 2 Gray (Mass.), 84, 'if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.' The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature" (p. 83). "In the construction of

a statute, every word is, if possible, to be given some effect. Nothing is to be stricken out if it can be avoided. It is not to be presumed that the legislature intended any part to be without meaning" (p. 84).

In *Poindexter* v. *Greenhow*, 114 U. S. 270, 304, certain bonds of the state of Virginia had been issued under an act providing that the coupons thereon should be receivable at and after maturity for all taxes due the state. Thereafter the legislature passed an act requiring tax collectors to receive in discharge of taxes gold, silver, treasury notes, national bank currency and nothing else, and forbidding the receipt of coupons issued under the foregoing act in payment therefor. The latter act also abolished the actions of trespass, and trespass on the case, and other particular forms of action as remedies for the taxpayer, who had tendered his coupons in payment of taxes. The court held that the provisions of the act providing that the coupons should be receivable in payment of taxes constituted a contract, and that the act providing that they should not be so receivable was unconstitutional as it impaired the obligation of that contract. It held also that those parts of the latter act abolishing the remedies of the taxpayer were not separable from the remainder of the act, inasmuch as they all constituted part of one plan, and that the entire act was, therefore, unconstitutional. Matthews, J., said:

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. *To hold otherwise would be to substitute for the law*

intended by the legislature one they may never have been willing by itself to enact."

In *Spraigue* v. *Thompson*, 118 U. S. 90, 95, a statute of Georgia provided that any master of a vessel bearing toward any of the ports of the state, except coasters in the state, and between the ports of the state and those of South Carolina or of Florida, who refused to receive a pilot on board, should be liable, on his arrival in such port of the state, to pay the first pilot who might have offered his services outside the bar the full rates of pilotage established by law. It was held that this provision was unlawful by reason of the fact that it discriminated in rates between the ports of different states. It was urged that the illegal exceptions might be disregarded so that the rest of the section could stand, upon the principle that a separable part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. The court said (Matthews, J.):

"The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. *It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions.*"

In *Baldwin* v. *Franks*, 120 U. S. 678, 685, a statute provided for the punishment of those who in any state or territory conspired for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws. It had previously been held that this statute was unconstitutional in so far as it applied to conspiracies to deprive persons of the equal

protection of the laws of the state, no special rights or privileges arising under the constitution, laws or treaties of the United States being involved. It was contended that, while this was the fact, still the statute was effectual so far as concerned conspiracies to deprive aliens of the rights guaranteed to them in a state by the treaties of the United States. The court said (Waite, C. J.):

> "In support of this argument reliance is had on the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a state, is not of that character, for in that connection it has no parts within the meaning of the rule. . . . It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

In *California* v. *Central Pacific Railroad Co.*, 127 U. S. 1. 45, it appeared that by the constitution of California two modes of assessment for taxation were prescribed: one by a state board of equalization, the other by county boards and local assessors. All property was directed to be assessed in the municipality in which it was situated,

except that the franchise, roadway, roadbed, rails and rolling stock of any railroad operated in more than one county were to be assessed by the state board, and apportioned to the several municipalities. By an act of the legislature, the state board was required to include in their assessment steamers engaged in transporting passengers and freights across waters which divided a railroad. This act had been held by the Supreme Court of California to be contrary to the constitution, and steamboats were held to be assessable by the county board, and not by the state board. The state board had made one assessment upon all the above-described property of the defendant, including such steamers and including also franchises granted by the United States. It was held by this court that the statute was unconstitutional in attempting to authorize an assessment in both of these respects; that the values of these steamers and franchises were so blended with the other items of which the assessment was composed that they could not be separated therefrom, and that the assessments were void. To the same effect is *Santa Clara Co.* v. *South. Pac. Railroad*, 118 U. S. 394.

In *Leloup* v. *Mobile*, 127 U. S. 640, 647, a state statute imposed a general license tax upon a telegraph company. It was held that this affected the entire business, interstate as well as domestic or internal, and was unconstitutional in its entirety. The court said (Bradley, J.):

> "It is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if

> not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

The subject was again reviewed by Mr. Chief Justice Fuller in *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 635, 636, where the above cases of *Poindexter* v. *Greenhow* and *Spraigue* v. *Thompson* were particularly cited with approval.

Conclusion.

It is submitted, therefore, that the statute of Minnesota now before the court should be declared unconstitutional, in so far as it affects interstate commerce, because its provisions conflict with the exclusive power of Congress to regulate commerce among the states and deny that freedom of commercial intercourse which it was the purpose of the framers of the Federal Constitution, above all other considerations, to secure to the people of the United States, and that the order of the Circuit Court should be affirmed.

Washington, February, 1901.

William D. Guthrie,
Albert H. Veeder,
Of counsel for appellee.

APPENDIX.

STATE STATUTES IN FORCE REGULATING MANUFACTURE AND SALE OF OLEOMARGARINE.

The proviso of the Massachusetts statute under consideration in the *Plumley* case reads as follows:

"*Provided*, That nothing in this act shall be construed to prohibit the *manufacture or sale of oleomargarine* in a separate and distinct form and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." (Mass. Stats. 1891, ch. 58, p. 695; Supp. to Pub. Stats., 1889–1895, p. 396.)

This proviso is retained in the latest act (Stat. 1894, ch. 280, p. 1009).

It has been, in substance, incorporated in the law of nineteen other states:

Alabama, Acts, 1894–5, p. 777. *California*, Penal Code, 1899, p. 517, 586. *Colorado*, Laws, 1895, ch. 19, p. 57. *Connecticut*, Pub. Laws, 1893, ch. 114, p. 264. *Delaware*, Laws, 1895, ch. 209, p. 274. *Georgia*, Laws, 1895, pt. 1, tit. 7, p. 67. *Idaho*, Laws, 1899, p. 548. *Maryland*, Laws, 1900, p. 791. *Michigan*, Pub. Acts, 1899, p. 218. *Missouri*, Laws, 1895, p. 26. *Nebraska*, Comp. Stats., 1895, pp. 1355–1357. *New Hampshire*, Laws, 1895, ch. 115, p. 477. *New Jersey*, Laws, 1895, ch. 332, p. 658. *Ohio*, Rev. Stat., 1899, vol. 2, tit. 5, ch. A, p. 2338. *South Carolina*, Laws, 1896, No. 96, p. 215. *Tennessee*, Anno. Code, 1896, ch. 16, p. 793. *Utah*, Rev. Stat., 1898, tit. 15, p. 242. *Washington*, Anno. Code, 1897, vol. 1, ch. 2, sec. 2846. *Wisconsin*, Laws, 1895, ch. 30, p. 77.

Eighteen other states provide for labeling, forbid artificial coloring, and the like, and otherwise allow unrestricted manufacture and sale:

Arkansas, Dig. of Stats., 1894, ch. 48, p. 522. *Florida*, Rev. Stat., 1891, ch. 8, p. 831. *Illinois*, Laws, 1897, p. 151. *Indiana*, Rev. Stat., 1897, sec. 2191, p. 351. *Iowa*, Anno. Code, 1897, secs. 2516-2518, p. 880. *Kentucky*, Laws, 1893, ch. 182, p. 794. *Louisiana*, Rev. Laws, 1897, p. 752. *Mississippi*, Anno. Code, 1892, sec. 1242, p. 365. *Montana*, Stats., 1895, tit. 10, p. 1078. *Nevada*, Gen. Stat., 1885, sec. 4810, p. 1069. *New York*, Rev. Stats., 1896, p. 40. *North Carolina*, Pub. Laws, 1895, ch. 106, p. 105. *North Dakota*, Laws, 1899, p. 91. *Oregon*, Anno. Laws, 1892, ch. 36, p. 1468; Laws, 1893, p. 102. *Pennsylvania*, Laws, 1899, p. 241. *Rhode Island*, Gen. Laws, 1896, ch. 146, p. 451. *Texas*, Rev. Stat., 1895, Penal Code, tit. 12, ch. 2. *Virginia*, Acts, 1899-1900, p. 1006.

In three states sales are forbidden unless the article has been artificially colored pink:

South Dakota, Sess. Laws, 1897, ch. 65, p. 183. *Vermont*, Stats., 1894, secs. 4334-4336, Laws 1890, No. 53, p. 63. *West Virginia*, Code, 1891, p. 1046, Acts, 1891, ch. 8, p. 12.

These three statutes are probably invalid under the decision in *Collins* v. *New Hampshire*, 171 U. S. 30, but they still appear on the statute books.

Supreme Court of the United States.

No. 159.—October Term, 1900.

The State of Minnesota, Appellant, vs. C. N. Brundage. } Appeal from the Circuit Court of the United States for the District of Minnesota.

[March 18th 1901.]

Mr. Justice Harlan delivered the opinion of the Court.

The appellee Brundage was arrested under a warrant issued by the Municipal Court of Minneapolis, Minnesota upon the complaint under oath of the Inspector of the State Dairy and Food Department of that State charging him with having violated a statute of Minnesota approved April 19th 1891 entitled "An act to prevent fraud in the sale of dairy products, their imitations or substitutes, and to prohibit and prevent the manufacture or sale of unhealthy or adulterated dairy products, and to preserve the public health." *Gen. Laws, Minn.* 1899, *c.* 295.

The specific offense charged was that the accused, in the county of Hennepin, Minnesota, "did wilfully, unlawfully and wrongfully offer and expose for sale, and have in his possession with intent to sell, a quantity of a certain compound designed to take the place of butter, and made in part from animal and vegetable oils and fats not produced from milk or cream, said compound being an article commonly known as oleomargarine, and being then and there colored with a coloring matter whereby the said article and compound was made to resemble butter, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Minnesota."

He was adjudged to be guilty and to pay a fine of twenty-five dollars and costs, or in default thereof to be committed to the workhouse to undergo hard labor for thirty days, unless he sooner paid the fine and costs or was thence discharged by due course of law.

Having been taken into custody in execution of the judgment, Brundage presented his application to the Circuit Court of the United States for a writ of *habeas corpus*, alleging that he was restrained of his liberty in violation of the Constitution of the United States. That court held the the statute to be unconstitutional and discharged the accused from the custody of the State authorities.

The State insists, upon this appeal, that the statute, at least in the particulars applicable to this case, was consistent with the Constitution of the United States.

This question is one of great importance, but we do not deem it necessary now to consider it; for in our opinion the Circuit Court should have denied the application for the writ of *habeas corpus*, without prejudice to a renewal of the same after the accused had availed himself of such remedies as the laws of the State afforded for a review of the judgment in the State court of which he complains.

We have held, upon full consideration, that although under existing statutes a Circuit Court of the United States has jurisdiction upon *habeas corpus* to discharge from the custody of State officers or tribunals one restrained of his liberty in violation of the Constitution of the United States, it is not required in every case to exercise its power to that end immediately upon application being made for the writ. "We cannot suppose," this court has said, "that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' (*R. S.* § 761,) does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the State, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. When the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under an alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under State authority. So, also, when they are in the custody of a State officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses." *Ex parte Royall*, 117 *U. S.* 241, 250; *Ex parte Fonda*, 117 *U. S.* 516, 518; *In re Duncan*, 139 *U. S.* 449, 454; *In re Wood*, 140 *U. S.* 278, 289; *McElvaine* v. *Brush*, 142 *U. S.*

155, 160; *Cook* v. *Hart*, 146 *U. S.* 183, 194; *In re Frederich*, 149 *U. S.* 70, 75; *New York* v. *Eno*, 155 *U. S.* 89, 96; *Pepke* v. *Cronan*, 155 *U. S.* 100; *In re Chapman*, 156 *U. S.* 211, 216; *Whitten* v. *Tomlinson*, 160 *U. S.* 231, 242; *Iasigi* v. *Van De Carr*, 166 *U. S.* 391, 395; *Baker* v. *Grice*, 169 *U. S.* 284, 290; *Tinsley* v. *Anderson*, 171 *U. S.* 101, 105; *Fitts* v. *McGhee*, 172 *U. S.* 516, 533; *Markuson* v. *Boucher*, 175 *U. S.* 184.

There are cases that come within the exceptions to the general rule. In *Loney's* case, 134 *U. S.* 372, 375, it appeared that Loney was held in custody by the State authorities under a charge of perjury committed in giving his deposition as a witness before a notary public in Richmond, Virginia, in the case of a contested election of a member of the House of Representatives of the United States. He was discharged upon a writ of *habeas corpus* sued out from the Circuit Court of the United States, this court saying: "The power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarily to the government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the State courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States, or upon a contested election of a member of Congress, were liable to prosecution and punishment in the courts of the State upon a charge of perjury, preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice." So, in *Ohio* v. *Thomas*, 173 *U. S.* 276, 284–5, which was the case of the arrest of the acting governor of the Central Branch of the National Home for Disabled Volunteer Soldiers, at Dayton, Ohio, upon a charge of violating a law of that State, the action of the Circuit Court of the United States discharging him upon *habeas corpus*, while in custody of the State authorities, was upheld upon the ground that the State court had no jurisdiction in the premises, and because the accused, being a Federal officer, "may, upon conviction be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the Federal Government might in the meantime be obstructed." The exception to the general rule was further illustrated in *Boske* v. *Comingore*, 177 *U. S.* 459, 466–7, in which the applicant for the writ of *habeas corpus* was discharged by the Circuit Court of the United States, while held by State officers, this court saying: "The present case was one of urgency, in that the appellee was an officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the State authorities might have interfered with the regular and orderly course of the business of the department to which he belonged."

The present case does not come within any of the exceptions to the general rule announced in the cases above cited. It is not, in any legal view, one of urgency. The accused does not, in his application, state any reason why he should not be required to bring the question involved in the prosecution against him before a higher court of the State and invoke its power to discharge him if in its judgment he is restrained of his liberty in violation of the Constitution of the United States. It cannot be assumed that the State court will hesitate to enforce any rights secured to him by that instrument; for upon them equally with the courts of the Union rests the duty to maintain the supreme law of the land. *Robb* v. *Connolly*, 111 *U. S.* 624, 637. If the State court declined to recognize the Federal right specially claimed by the accused, the case could be brought here for review.

After observing that the questions of constitutional law arising in this case had been determined in *Schollenberger* v. *Pennsylvania*, 171 *U. S.* 1, and *Collins* v. *New Hampshire*, 171 *U. S.* 30, adversely to the present contention of the State, and that there was jurisdiction to discharge the petitioner on *habeas corpus*, the Circuit Court said: "Even then, for reasons of comity, such power will seldom be exercised by the Circuit Court to discharge a petitioner held under process from a State court, even after conviction by the trial court, unless large interests affecting the business of many or the rights of the public are so involved that serious consequences will follow from the delay which will be caused by the prosecution of a writ of error to a final decision, or unless the question has already been decided by the Supreme Court of the United States, whose decision the State court has disregarded in the proceeding. State statutes prohibiting the importation from other States and sale of articles of commerce, especially articles of food, or adapted for general use, are regarded as affecting general interests and the rights of the public; and *habeas corpus* has frequently been resorted to in cases of imprisonment for violation of such statutes." *In re Brundage*, 96 *Fed. Rep.* 963, 969.

Among the cases cited in support of the action of the Circuit Court are *Minnesota* v. *Barber*, 136 *U. S.* 313, and *Plumley* v. *Massachusetts*, 155 *U. S.* 461. It must be admitted that in the first named case the general rule announced in prior and subsequent cases was not applied. The reasons for not then applying it do not appear from the opinion of the court. It may be that the precise point now under examination was not called to its attention. *Plumley* v. *Massachusetts* is not in point, for it came to this court upon writ of error to the highest court of Massachusetts.

It is undoubtedly true that the State enactment in question may in its operation affect the business of many, and in some degree, but indirectly, the rights of the public; but that consideration is not sufficient to justify such interference by the Federal court as will interrupt the orderly course of pro-

ceedings in the State court. We do not think that the exercise by a Federal court of its power upon *habeas corpus* to discharge one held in custody by the State authorities and charged with a violation of a State enactment should be materially controlled by any consideration of the extent of particular business interests that may be affected by a prosecution instituted in a State tribunal against him, or of the indirect effect of his detention in custody upon the rights of the general public. Nor do we think that the Circuit Court should have interfered with the custody of the appellee because in its opinion the action of the Municipal Court of Minneapolis was inconsistent with the judgments of this court in the *Schollenberger* and *Collins* cases. Upon that question the State court was entitled to form its own opinion, and give judgment accordingly. Whether, in view of the judgments in the *Schollenberger* and *Collins* cases, the State court should have held the Minnesota statute to be repugnant to the Constitution of the United States, it is not necessary now to say. Besides, the record does not show that the attention of the Municipal Court of Minneapolis was called to those cases; much less is there any reason to suppose that it deliberately refused to accept the decisions of this court as controlling upon questions arising under the Constitution of the United States. As disclosed by the record, the case, we repeat, is not one of urgency within the meaning of our decisions, and does not suggest any adequate reason why the appellee should not be required, before applying to the Circuit Court of the United States to be discharged upon *habeas corpus*, to seek at the hands of the higher courts of the State a reversal of the judgment rendered against him in the Municipal Court of Minneapolis.

Without expressing any opinion as to the validity of the Minnesota statute, the judgment of the Circuit Court must be reversed, with directions to dismiss the application for a writ of *habeas corpus*, without prejudice to a renewal of it when the appellee shall have exhausted the remedies provided by the State for a review of the judgment of the Municipal Court of Minneapolis.

Reversed.

True copy.

Test:

Clerk Supreme Court, U. S.